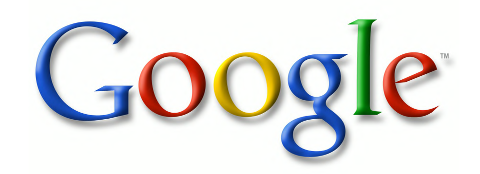






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THE GENERAL PRINCIPLES

OF THE

AMERICAN LAW

OF

THE SALE OF GOODS

IN THE FORM OF RULES WITH COMMENTS
AND ILLUSTRATIONS

CONTAINING ALSO

THE ENGLISH "SALE OF GOODS ACT"

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PREFACE.

The form of this work is similar to the one published by me in 1889 entitled "Principles of Contract." That work was an attempt to state methodically, in concise language, the fundamental principles of contract. The statements are in the form of rules (in the nature of a code), followed by such comments and illustrations as seemed suitable to bring out clearly the import of each proposition; and each proposition is supported by the authority of adjudged cases, selected with a view to force of reasoning and pertinency of illustration.

The law of the Sale of Goods is the most important branch of the general law of Contract. This work naturally follows the other. It was commenced soon after the publication of that work, and was nearly completed, when I learned that a Sale of Goods Bill was before Parliament and that the purpose of its enactment was "to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the Legislature." In other words, it was substantially an effort to make the clauses of the Bill concise and accurate statements of the principles of the common law relating to the Sale of Goods. Upon examination of the Bill, and in view of the great pains taken to insure its accuracy, I concluded to take it, if enacted, as the basis of this work, by following the clauses of the Act with only such modifications as might seem necessary to make them correct and

logical inductions from the American cases. I have followed this plan as to statement of the rules, and have used, by way of citations, comments and illustrations, the materials I had already prepared. Accordingly, this work is in substance a Commentary on the English "Sale of Goods Act."

The Act itself is set out at large in the Appendix, together with a sketch given by the draftsman of the Bill, Judge Chalmers, showing its consideration and revision by Special Committees consisting of the best legal talent of England. This Act went into operation January 1, 1894, and except in a few particulars, due mainly to previous legislation, it undoubtedly will be regarded, wherever the English common law system prevails, as the best embodiment of the principles of that law in relation to the Sale of Goods.

I trust that the present compilation, combining all of the English Act that is believed to be generally in force in this country with explanatory comments, illustrative cases, and ample citations for verification and further investigation of the principles stated, will serve as a useful compendium alike for the American student and the American lawyer.

R. M. B.

Bloomington, Illinois, January, 1896.

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THE SALE OF GOODS.

CHAPTER I

FORMATION OF THE CONTRACT.

Contract of Sale.

Rule 1.—(A.) A TRANSFER BY OR UNDER A CONTRACT (1) OF THE PROPERTY (2) IN GOODS (3) FOR A PRICE (4) IS CALLED A SALE (5).

1. The transfer of the property in the goods is essential to a sale. But the property may be transferred immediately by the contract itself, or at a later period under and as the result of compliance with the terms of the contract (*a*). And the transfer may be absolute or conditional (*b*).

(a) See "agreement to sell," r 1 (B).

(b) See "sale on approval," r 23, s-r 5; "sale or return," r 23, s-r 4; "reservation of right of disposal," r 24 (A).

2. By "*the* property" is here meant the general property or ownership as distinguished from "*a* property," that is, a special property, in the goods, such as that of a pledgee or other bailee (*a*). The general property may be transferred to one person subject to a special property in another (*b*).

(*a*) Burdick v. Sewell, 13 Q.B.D. p 175; S.C. 10 App. Cas. p. 93.
Union Trust Co. v. Rigdon, 93 Ill. 458, 465.

(*b*) Franklin v. Neate, 13 M. & W. 481, 486
Whitaker v. Sumner, 20 Pick. 399, 405.
Cooper v. Ray, 47 Ill. 53, 57.

3. "Goods" include all corporeal chattels personal, except money (*a*). The term does not include mere rights without any visible and palpable form (*b*). It has been held in some of the states that promissory notes are "merchandise"(*c*), and in others that they are not "goods"(*d*).

(*a*) Wookey v. Pole, 4 B. & Ald. p. 6.
Jones v. Nellis, 41 Ill. p. 485.
Spooner v. Holmes, 102 Mass. p. 507.
See also Sewall v. Allen, 6 Wend. p. 355.
Citizens' Bank v. Steamboat Co. 2 Story, p. 52.
Chicago, etc. R.R. Co. v. Thompson, 19 Ill. p. 584.

(*b*) Kirkland v. Brune, 31 Grattan, 126, 131.
Green v. Brookins, 23 Mich. 48, 53.
Somerby v. Buntin, 118 Mass. 279, 285.
Meehan v. Sharp, 151 Mass. 564, 566.
Webb v. R.R. Co. 77 Md. 92.

(*c*) Baldwin v. Williams, 3 Met. 365, 367.
Greenwood v. Law, 55 N.J.L. 168, 176.

(*d*) Whittemore v. Gibbs, 24 N.H. 484, 488.
Vawter v. Griffin, 40 Ind. 593, 600.
Crawford v. Schmitz, 139 Ill. 564, 568.

Growing crops of annual culture, being raised by the industry of man *(fructus industriales)* are regarded, for most purposes, as chattels personal

Evans v. Roberts, 5 B. & C. 829.
Jones v. Flint, 10 Ad. & E. 753.
Whipple v. Foot, 2 Johns. 418.
Westbrook v. Eager, 16 N.J.L. 81.
Brittain v. McKay, 1 Ired. L. 265.
Northern v. State, 1 Ind. 113.
Ross v. Welch, 11 Gray, 235.
Bull v. Griswold, 19 Ill. 631.
Graff v. Fitch, 58 Ill. 373.
Marshall v. Ferguson, 23 Cal. 65.
Davis v. McFarlane, 37 Cal. 634.
Mabry v. Harp, 53 Kan. 398.

4. The price is the consideration for the goods. It may be paid, or promised, or part paid and part promised.

"Price" implies a money consideration, or at least a consideration stated in money terms. The transfer is said to be a sale where the consideration is stated in money terms, although to the amount stated, it may be payable in goods at a definite valuation (*a*). It was so held where a merchant furnished dry goods from time to time at agreed prices payable in nails at a certain rate per hundred pounds (*b*).

Where the consideration consists merely of other goods without such statement in money terms the transaction is called an exchange or barter (*c*). An averment of a sale is not supported by proof of an exchange (*d*). But except as to the

mode of pleading the rules of law applicable to sale and exchange are substantially the same (*e*).

(*a*) Gunter v. Leckey, 30 Ala. p. 596.
Loomis v. Wainwright, 21 Vt. 520, 528.
Picard v. McCormick, 11 Mich. 68, 77.
Forsyth v. Jervis, 1 Starkie, 437.

(*b*) Herrick v. Carter, 56 Barb. 41.

(*c*) Fuller v. Duren, 36 Ala. 73, 77.

(*d*) Mitchell v. Gile, 12 N.H. 390.
Slayton v. McDonald, 73 Me. 50.
Harrison v. Luke, 14 M. & W. 141.

(*e*) Commonwealth v. Clark, 14 Gray, p. 372.
And see Carey v. Guillow, 105 Mass. 18.
Bixler v. Saylor, 68 Pa. St. 146.
Hudson Iron Co. v. Alger, 54 N.Y. 173.

Where the property in goods is transferred voluntarily and without any price or other consideration, as it may be by delivery of the possession with intent to transfer the property, the transaction is called a gift (*a*).

A parol gift may be consummated by subsequent delivery or authorized entry into possession by the donee (*b*); and a manual delivery of the goods is not necessary where they are already in the possession of the donee (*c*).

(*a*) Cochrane v. Moore, 25 Q.B.D. 57.
In re Campbell's Estate, 7 Pa. St. 101.
People v. Johnson, 14 Ill. 343.
Gray v. Barton, 55 N.Y. 72.
Miller v. Piere, 136 Mass. 22.
Flanders v. Blandy, 45 Ohio St. 113.

(*b*) London Law Quarterly Review, Vol. 6, p. 450.
Carpenter v. Davis, 71 Ill. 395.
Carradine v. Carradine, 58 Miss. 286.

(c) Kilpin v. Ratley, (1892) 1 Q.B. 582.
Tenbrook v. Brown, 17 Ind. 410.
Wing v. Merchant, 57 Me. 383.

Where the identical goods delivered are to be restored in the same or an altered form (as where wheat is to be restored as flour) the property in the goods is not changed; the transaction is a bailment (*a*).

But where there is no obligation to restore the specific goods, and the receiver is at liberty to return other goods of equal value or the value in money, he becomes a debtor to make the return, and the property in the goods is changed (*b*).

It is held, however, that where grain is deposited with a warehouseman, with an understanding that it will be mingled with other similar grain of other parties, and that its equivalent from the common mass will be returned in the same or an altered form, the depositor is a tenant in common *pro rata* with all the other like depositors, and the warehouseman is their common bailee. This is merely the case of an intermixture or confusion of goods with the consent of the owners, and each remains the owner of his share in the common stock (*c*).

But if by the contract, express or implied, the depositor has parted with the right to reclaim the goods or their equivalent from the common stock, and the warehouseman has acquired the right at his pleasure either to return them or to consume or sell them on his own account and pay for them in money, the warehouseman is not a bailee; the property in the goods has passed to him (*d*).

(*a*) Sturm v. Boker, 150 U.S. 312, 329.
Foster v. Pettibone, 7 N.Y. 433.
Mansfield v. Converse, 8 Allen, 182.

(b) Powder Co. v. Burkhardt, 97 U.S. 110, 116.
Smith v. Clark, 21 Wend. 83.
Norton v. Woodruff, 2 N.Y. 153.
Butterfield v. Lathrop, 71 Pa. St. 225.
Chickering v. Bastress, 130 Ill. 206.
Cloke v. Shafroth, 137 Ill. 393.
Peoria Mfg. Co. v. Lyons, 153 Ill. 427.
Reherd v. Clem, 86 Va. 374.

(c) Dole v. Olmstead, 36 Ill. 150; S.C. 41 Ill. 344.
German Nat. Bank v. Meadowcroft, 95 Ill. 124.
Young v. Miles, 20 Wis. 615; S.C. 23 Wis. 643.
Cushing v. Breed, 14 Allen, 376, 380.
Forbes v. R.R. Co. 133 Mass. 154, 160.
Bretz v. Diehl, 117 Pa. St. 589, 603.
O'Dell v. Leyda, 46 Ohio St. 244.
James v. Plank, 48 Ohio St. 255.

(d) South Australian Ins. Co. v. Randell, L.R. 3 P.C. 101
Chase v. Washburn, 1 Ohio St. 244, 252.
Lonergan v. Stewart, 55 Ill. 44.
Richardson v. Olmstead, 74 Ill. 213.
Johnston v. Browne, 37 Iowa, 200.
Barnes v. McCrea, 75 Iowa, 267.
Lyon v. Lenon, 106 Ind. 567, 572.
Woodward v. Boone, 126 Ind. 122.
Bretz v. Diehl, 117 Pa. St. p. 604.

5. "Sale" includes a bargain and sale as well as a sale and delivery.

The delivery of the goods is not essential to the transfer of the property therein.

See r 52 (A), n 2.

Rule 1.—(B.) A CONTRACT WHEREBY SUCH TRANSFER IS TO TAKE PLACE AT A FUTURE TIME OR SUBJECT TO SOME CONDITION THEREAFTER TO BE FULFILLED IS CALLED AN AGREEMENT TO SELL.

An agreement to sell is a contract in the narrower sense of the term. It creates a right *in personam*, which may or may not be followed by a right *in rem*. But it does not by itself at once transfer the property in the goods.

"If the property by the terms of the agreement passes immediately to the buyer, the contract is deemed a bargain and sale; but if the property in the thing sold is to remain for a time in the seller, and only to pass at a future time or on certain conditions inconsistent with its immediate transfer, the contract is deemed an executory agreement."

Hatch v. Oil Co. 100 U.S. p. 131.
See also Johnson v. Macdonald, 9 M. & W. 600.
Jennings v. Gage, 13 Ill. 610.
Weed v. Ice Co. 12 Allen, 377.
Elgee Cotton Cases, 22 Wal. 187.
Beardsley v. Beardsley, 138 U.S. 266.

Although words in the present tense, as "A sells," used at the commencement of a contract, import by themselves, an immediate transfer of the property, yet they may be controlled by the subsequent provisions (*a*). And, on the other hand, such words as "A agrees to sell," taken in connection with the other provisions of the contract, may under the circumstances, evince an intention to consummate a present, unconditional sale (*b*).

(a) Decker v. Furniss, 14 N.Y. 615, 619.
Sherwin v. Mudge, 127 Mass. 547, 549.
Brock v. O'Donnell, 45 N.J.L. 441.
Lester v. East, 49 Ind. 588.
Kost v. Reilly, 62 Conn. 57.

(b) Martin v. Adams, 104 Mass. 262.
Bangs v. Friezen, 36 Minn. 423.

Rule 1.—(C.) *EXPLANATION:* THE TERM "CONTRACT OF SALE" INCLUDES AN AGREEMENT TO SELL AS WELL AS A SALE (1). THE PARTIES TO A CONTRACT OF EITHER KIND ARE RESPECTIVELY CALLED "SELLER" AND "BUYER."

1. The former is frequently called an *executory* and the latter an *executed* contract of sale.

Rule 2.—SUBJECT TO THE PROVISIONS OF ANY STATUTE IN THAT BEHALF (1), A CONTRACT OF SALE MAY BE MADE IN WRITING (EITHER WITH OR WITHOUT SEAL), OR BY WORD OF MOUTH, OR PARTLY IN WRITING AND PARTLY BY WORD OF MOUTH (2), OR MAY BE IMPLIED FROM THE CONDUCT OF THE PARTIES (3).

1. The 17th section of the Statute of Frauds (29 Car., II. c. 3) with some modifications is in force in England and several of the states, but not in Pennsylvania, Ohio, Illinois, and many other states.

Rhea v. Riner, 21 Ill. 531.
Barrow v. Window, 71 Ill. 218.

The following is the language of the original section of the English statute:

"No contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

In Illinois there is a statute which provides that "where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife shall be valid as against the rights and interests of any third person, unless such transfer or conveyance be in writing, and be acknowledged and recorded in the same manner as chattel mortgages are required to be acknowledged and recorded by the laws of this state, in cases where the possession of the property is to remain with the mortgagor." Rev. St. Ill., Ch. 68., §9.

As to what are vessels of the United States, their registry and transfer, see Rev. St. U.S., Title XLVIII, Ch. 1.

2. The written part may be merely an order for goods referring to and based upon a previous conversation and understanding as to the time for payment.

Lockett v. Nicklin, 2 Exch. 93.
See also Pacific Iron Works v. Newhall, 34 Conn. 67, 76.
Routledge v. Worthington Co. 119 N.Y. 592, 595.
Penn v. Smith, 93 Ala. 476, 481.

The part reduced to writing may be merely given in part performance of an entire contract (*a*) as where a horse is sold for $100 and the buyer gives his promissory note for $80 and agrees to do certain work for the $20 (*b*).

(*a*) Healy v. Young, 21 Minn. 389, 391.
Clarke v. Tappin, 32 Conn. 56, 67.
Barker v. Bradley, 42 N.Y. 316, 319.

(*b*) Bradshaw v. Combs, 102 Ill. 428, 433.

There may be an oral acceptance of a written offer and *vice versa.* Such a contract is, in legal effect, an oral one (*a*). A writing, however, which on its face purports to be a consummated contract, although signed by only one of the parties therein designated, is treated as a written contract when it is accepted and adopted by the other party (*b*).

(*a*) Commissioners v. Shipley, 77 Ind. 553.
Hulbert v. Atherton, 59 Iowa, 91.

(*b*) Ames v. Moir, 130 Ill. 582.
Memory v. Niepert, 131 Ill. 623.

3 The subsequent course of dealing and conduct of two parties in accordance with an informal draft of an agreement may establish a binding contract between them, although an agreement is never signed. "There may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description * * * as regards form."

Brogden v. Ry. Co. 2 App. Cas. 666, 672.

The delivery of goods upon an order may consummate a sale of them (*a*). And without any order, a sale will be implied where one merchant

sends goods to another with an invoice thereof, and the latter receives the goods without objection and converts them to his own use (*b*).

Where cross-ties are deposited, according to a usage known to the parties, along the line of a railroad, for inspection and acceptance by the company, this amounts to a proposal to sell, and the subsequent appropriation of them by the company is an acceptance of the offer, which completes a bargain and sale (*c*).

(*a*) Taylor v. Jones, 1 C.P.D. 87, 90.
Rickey v. Stewart, 45 Minn. 437.

(*b*) Wellauer v. Fellows, 48 Wis. 105, 108.
Bartholomae v. Paull, 18 W.Va. 771, 779.
Ind. Mfg. Co. v. Hayes, 155 Pa. St. 160.
Hobbs v. Whip Co. 158 Mass. 194.

(*c*) Kinney v. R.R. Co. 82 Ala. 368.

Subject Matter of Contract.

Rule 3.—(A.) THE GOODS WHICH FORM THE SUBJECT OF A CONTRACT OF SALE MAY BE EITHER EXISTING GOODS, OWNED OR POSSESSED BY THE SELLER, OR GOODS TO BE MANUFACTURED OR ACQUIRED BY THE SELLER AFTER THE MAKING OF THE CONTRACT OF SALE, HEREAFTER CALLED "FUTURE GOODS."

The goods which form the subject of a present sale must be in existence, owned or possessed by the seller (*a*). There may be a present sale of a growing crop (*b*), but not of fish to be caught in the sea (*c*).

(*a*) Lunn v. Thornton, 1 C.B. 379, 386.
Hamilton v. Rogers, 8 Md. 301, 315.
Wilson v. Wilson, 37 Md. 1, 11.
Wheeler v. Wheeler, 2 Met. (Ky.) 474, 477.
Ingraham v. Whitmore, 75 Ill. 24, 28.
Williams v. Briggs, 11 R.I. 476, 478.

(*b*) Northern v. State, 1 Ind. 113.
Graff v. Fitch, 58 Ill. 373.
Hansen v. Dennison, 7 Ill. App. 73.
Mabry v. Harp, 53 Kan. 399.

(*c*) Low v. Pew, 108 Mass. 347.

Goods to be manufactured or acquired by the seller may be the subject of an agreement to sell

Hibblewhite v. M'Morine, 5 M. & W. 462.
Stanton v. Small, 3 Sandf. 230.
Whitehead v. Root, 2 Met. (Ky.) 584.
Sawyer v. Taggart, 14 Bush, 727.
Smith v. Bouvier, 70 Pa. St. 325.
Wolcott v. Heath, 78 Ill. 433.
Logan v. Musick, 81 Ill. 415.
White v. Barber, 123 U.S. 392.

But a contract for the sale of goods which the seller can only acquire by purchase is in the nature of a gambling venture and is illegal where the parties do not contemplate any purchase and delivery of goods to fill the contract, but are merely risking the difference between the contract price and the market price of such goods at a future day whereby one would win what the other would lose

Grizewood v. Blane, 11 C.B. 526, 541.
Brua's Appeal, 55 Pa. St. 294, 298.
Kirkpatrick v. Bonsall, 72 Pa. St. 155, 158.
Waugh v. Beck, 114 Pa. St. 422.
Pickering v. Cease, 79 Ill. 328.
Lyon v. Culbertson, 83 Ill. 33.
Pearce v. Foote, 113 Ill. 228.
Cothran v. Ellis, 125 Ill. 496.

Schneider v. Turner, 130 Ill. 28.
Pope v. Hanke, 155 Ill. 617.
Gregory v. Wendell, 39 Mich. 337, 340.
Everingham v. Meighan, 55 Wis. 354.
Irwin v. Williar, 110 U.S. 499.
Embry v. Jemison, 131 U.S. 336.
Cunningham v. Nat. Bank, 71 Ga. 400.
Seeligson v. Lewis, 65 Tex. 215, 219.
Beadles v. McElrath, 85 Ky. 230.
Crawford v. Spencer, 92 Mo. 498, 505.
Sondheim v. Gilbert, 117 Ind. 71, 74.
Harvey v. Merrill, 150 Mass. 1, 8.
Mohr v. Miesen, 47 Minn. 228.
Lester v. Buel, 49 Ohio St. 240.

If, however, one of the parties acts in good faith, with the intention and expectation of delivering or receiving the goods, the transaction as to him will be valid.

Pixley v. Boynton, 79 Ill. 351.
Murry v. Ocheltree, 59 Iowa, 435.
Wall v. Schneider, 59 Wis. 352.
Whitesides v. Hunt, 97 Ind. 191.
Cockrell v. Thompson, 85 Mo. 510.

If the goods have what is called a *potential* existence, that is to say, if they would be the increase or product of something already belonging to the seller; as the wool to be grown on his own sheep or the crops to be grown on his own land for a definite and reasonable period of time (*a*), the property therein passes to the buyer as soon as they come into actual existence (*b*).

(*a*) Shaw v. Gilmore, 81 Me. 396.
Pennington v. Jones, 57 Iowa, 37.

(*b*) Grantham v. Hawley, Hobart, 132.
Petch v. Tutin, 15 M. & W. 110, 116.
Fonville v. Casey, 1 Murphy, (N. Car.) 389, 390.
Van Hoozer v. Cory, 34 Barb. 9, 12.

M'Caffrey v. Woodin, 65 N.Y. 459, 464.
Phila. etc. R.R. Co. v. Woelpper, 64 Pa. St. p. 371.
Low v. Pew, 108 Mass. p. 350.
Butt v. Ellett, 19 Wal. 544, 547.
Briggs v. United States, 143 U.S. 346, 354.
Arques v. Wasson, 51 Cal. 620.
Headrick v. Brattain, 63 Ind. 438.
McCown v. Mayer, 65 Miss. 537.
Hull v. Hull, 48 Conn. 250, 256.
Gundy v. Biteler, 6 Ill. App. 510.
Dickey v. Waldo, 97 Mich. 255.

A similar principle applies to the subsequently acquired rolling stock, and the like accessions of a railroad.

Morrill v. Noyes, 56 Me. 458, 467.
Phila. etc. R.R. Co. v. Woelpper, 64 Pa. St. 366.
Shaw v. Bill, 95 U.S. 10.
Buck v. Seymour, 46 Conn. 156.
Quincy v. R.R. Co. 94 Ill. 537.
Miss.Val. Co. v. R.R. Co. 58 Miss. p. 904.

In other cases the *legal* property in goods to be acquired by the seller does not pass to the buyer unless and until the seller does some act, after their acquisition, appropriating them to the contract (*a*), or the buyer takes possession of them with the consent of the seller (*b*), or under a license to seize, which is equivalent to a delivery by the seller (*c*).

(*a*) Lunn v. Thornton, 1 C.B. 379, 386.
Hurst v. Bell, 72 Ala. p. 340.

(*b*) Rowley v. Rice, 11 Met. 333.
Chapman v. Weimer, 4 Ohio St. 481.

(*c*) Hope v. Hayley, 5 E. & B. 830.
Calkins v. Lockwood, 16 Conn. 276.
M'Caffrey v. Woodin, 65 N.Y. 459.
Chase v. Denny, 130 Mass. 566.
Blanchard v. Cooke, 144 Mass. 207.

Bennett v. Bailey, 150 Mass. 257.
Deering v. Cobb, 74 Me. 332, 335.
Tennis v. Midkiff, 55 Ill. App. 642.

But if the goods be sufficiently described to be identified on acquisition by the seller, the *equitable* interest in them passes to the buyer as soon as they are acquired, for equity treats as done that which ought to be done (*a*). This equitable interest, however, while the seller remains in possession of the goods, is liable to be defeated by a *bona fide* purchaser from the seller (*b*), or an attaching or execution creditor of the seller (*c*).

(*a*) Mitchell v. Winslow, 2 Story, 630, 638.
Holroyd v. Marshall, 10 H.L. Cas. 191.
Tailby v. Official Receiver, 13 App. Cas. p. 546.
Phila. etc. R.R. Co. v. Woelpper, 64 Pa. St. p. 372.
M'Caffrey v. Woodin, 65 N.Y. p. 465.
Kribbs v. Alford, 120 N.Y. 519, 524.
Webster v. Nichols, 104 Ill. 160, 177.
Borden v. Croak, 131 Ill. 68, 76.
Hurst v. Bell, 72 Ala. 336, 340.
Ludlum v. Rothschild, 41 Minn. 218.

(*b*) Joseph v. Lyons, 15 Q.B.D. 280.
Hallas v. Robinson, 15 Q.B.D. 288.
Deering v. Cobb, 74 Me. p. 334.

(*c*) Gregg v. Sanford, 24 Ill. 17.
Gittings v. Nelson, 86 Ill. 591.
Looker v. Peckwell, 38 N.S.L. 253; S.C. 39 N.J.L. 134
Blanchard v. Cooke, 144 Mass. pp. 218, 222.
Rochester Distilling Co. v. Rasey, 142 N.Y. 570.

Rule 3—(B.) THERE MAY BE A CONTRACT FOR THE SALE OF GOODS, THE ACQUISITION OF WHICH BY THE SELLER DEPENDS UPON A CONTINGENCY WHICH MAY OR MAY NOT HAPPEN.

In a contract for the sale of a crop to be grown on specific land there is an implied condition that such a crop at the proper time (the seller being without fault) should be in existence.

Where there was a contract for the sale of 200 tons of potatoes off a certain piece of land which, in ordinary years, was amply sufficient to produce such a crop, but owing to blight only produced 80 tons, which were delivered, it was held that the seller was not liable for non-delivery of the remainder.

Howell v. Coupland, L.R. 9 Q.B. 462; S.C. 1 Q.B.D. 258.
See also Rice v. Weber, 48 Ill. App. 573.

A contract for the sale of goods "to arrive" or "on arrival," by a particular vessel by a certain time, or otherwise, does not, in the absence of a contrary intention (*a*), import a stipulation on the part of the seller that the goods shall so arrive; but the contract is deemed to be dependent upon the double contingency (*b*) of the arrival, in the ordinary course of navigation, within the time limited therefor, if any, of the vessel with the goods contracted for (*c*) on board.

(*a*) Hale v. Rawson, 4 C.B. N.S. 85.

(*b*) Johnson v. Macdonald, 9 M. & W. 600.
Rogers v. Woodruff, 23 Ohio St. 632.
Neldon v. Smith, 36 N.J.L. 154.

(*c*) Vernede v. Weber, 1 H. & N. 311.
Shields v. Pettie, 4 N.Y. 122.
See Dike v. Reitlinger, 23 Hun. 241.

Rule 3.—(C.) WHERE BY A CONTRACT OF SALE THE SELLER PURPORTS TO EFFECT A PRESENT SALE OF FUTURE GOODS, THE CONTRACT OPERATES AS AN AGREEMENT TO SELL THE GOODS.

Anderson v. Read, 106 N.Y. 333, 344.
Blackwood v. Packing Co. 76 Cal. 212, 215.
And see Bradish v. Yocum, 130 Ill. 386.

The fundamental difference between a sale, properly so-called, and an agreement to sell, is, that in the former case the property in the goods passes, while in the latter case it does not, at the time when the contract is made.

See r 1 (B), n.

Rule 4.—WHERE THERE IS A CONTRACT FOR THE SALE OF SPECIFIC GOODS (1), AND THE GOODS, WITHOUT THE KNOWLEDGE OF THE SELLER, HAVE PERISHED AT THE TIME WHEN THE CONTRACT IS MADE, THE CONTRACT IS VOID (2).

1. Unless the context or subject matter otherwise requires, "specific goods," in this work, mean goods identified and agreed upon at the time a contract is made.

The sale of an article containing secret treasure is no sale of the treasure (*a*).

Nor is there a sale of goods if there is a material mistake as to their identity, and not merely as to their quality; as where at auction one bids off one lot of goods supposing it to be another lot (*b*).

There must be a meeting of the minds of the parties as to the subject matter of the sale (*c*).

(a) Huthmacher v. Harris, 38 Pa. St. 491.
Durfee v. Jones, 11 R.I. 588.
Bowen v. Sullivan, 62 Ind. 281.
Livermore v. White, 74 Me. 452.
See also Merry v. Green, 7 M. & W. 623.
Elwes v. Gas Co. 33 Ch. D. 562.

(b) Sheldon v. Capron, 3 R.I. 171.
Harvey v. Harris, 112 Mass. 32.

(c) Chapman v. Cole, 12 Gray, 142.
Utley v. Donaldson, 94 U.S. pp. 47, 48.
Raffles v. Wichelhaus, 2 H. & C. 906.

2. Allen v. Hammond, 11 Pet. 71.
Thompson v. Gould, 20 Pick. p. 139.
Rice v. Mfg. Co. 2 Cush. p. 86.
Bradford v. Chicago, 25 Ill. p. 423.

The rule is confined to the case of specific goods. The parties to such contract must have contemplated that there was an existing something to be sold and bought (a). If the thing had perished there was a mutual mistake of fact and a want of consideration for the price (b).

(a) Couturier v. Hastie, 5 H.L. Cas. 673, 681.
(b) Allen v. Hammond, 11 Pet. 71.

Rule 5—WHEN THERE IS AN AGREEMENT TO SELL SPECIFIC GOODS, AND SUBSEQUENTLY THE GOODS, WITHOUT ANY FAULT (1) ON THE PART OF THE SELLER OR BUYER, PERISH BEFORE THE RISK PASSES TO THE BUYER, THE AGREEMENT IS THEREBY AVOIDED (2).

1. "Fault" means wrongful act or default.

2. By express stipulation the risk of loss may pass to the buyers before the property in the goods passes (a).

In other cases an agreement to sell specific goods is subject to an implied condition that the parties shall be excused if, before breach, performance becomes impossible from the perishing of the goods without the fault of either of them (*b*). It was so held where there was an agreement to sell certain specific bales of cotton, and while the property therein was still in the seller, they were destroyed by fire (*c*).

(*a*) See r 25, n 1.

(*b*) Thompson v. Gould, 20 Pick. 134, 139.
Wells v. Calnan, 107 Mass. 514, 515.
Thomas v. Knowles, 128 Mass. 22.
Dexter v. Norton, 47 N.Y. 62, 65.
Gould v. Murch, 70 Me. 288.
Howell v. Coupland, L.R. 9 Q.B. 462, 465; S.C. 1 Q.B. D. 258, 262.

(*c*) Dexter v. Norton, 47 N.Y. 62.

The Price.

Rule 6.—THE PRICE IN A CONTRACT OF SALE MAY BE FIXED BY THE CONTRACT (1), MAY BE LEFT TO BE FIXED IN MANNER THEREBY AGREED (2), MAY BE DETERMINED BY THE COURSE OF DEALING BETWEEN THE PARTIES (3), OR MAY BE LEFT TO BE DETERMINED BY WHAT IS REASONABLE UNDER THE CIRCUMSTANCES OF THE CASE (4).

1. There is no sale where there is a material misunderstanding between the parties in regard to the price.

Rovegno v. Defferari, 40 Cal. 459.
Rupley v. Daggett, 74 Ill. 351.
Harran v. Foley, 62 Wis. 584.
Hogue v. Mackey, 44 Kan. 277.

2. It may be agreed that the price shall be fixed by reference to the reports of sales at a future time and specified place (*a*), or by the amount of a re-sale (*b*), or by the valuation of a third party (*c*).

(*a*) McConnell v. Hughes, 29 Wis. 537.
Richardson v. Olmstead, 74 Ill. 213.
Callaghan v. Myers, 89 Ill. p. 570.
Ames v. Quimby, 96 U.S. 324.
Lucas Coal Co. v. Canal Co. 148 Pa. St. 227.

(*b*) Foster v. Magill, 119 Ill. 75, 81.
Phifer v. Erwin, 100 N. Car. 59, 73.

(*c*) Brown v. Bellows, 4 Pick. 189.
Norton v. Gale, 95 Ill. 533.
Willingham v. Veal, 74 Ga. 755.

But a contract for an alternative price, if in the nature of an illegal wager, is void.

Rourke v. Short, 5 E. & B. 904.
Brogden v. Marriott, 3 Bing. N.C. 88.
Marean v. Longley, 21 Me. 26.
Todd v. Caplinger, 4 Bush, 139.
Bates v. Clifford, 22 Minn. 52.
Davis v. Leonard, 69 Ind. 213.
Harper v. Crain, 36 Ohio St. 338.
Merchants' Trust Co. v. Goodrich, 75 Ill. 554.
And see Rev. St. Ill. Ch. 38, §§131, 132.

3. In such case it would be determined according to their implied contract, as they presumably contract with reference to their former dealing.

4. Hoadley v. M'Laine, 10 Bing. 482, 487.
Valpy v. Gibson, 4 C.B. 837, 864.
Joyce v. Swann, 17 C.B. N.S. 102.
United States v. Wilkins, 6 Wheat. 135.
Taft v. Travis, 136 Mass. 95, 102.
Shealy v. Edwards, 73 Ala. 182.
Greene v. Lewis, 85 Ala. 221.

What is a reasonable price is a question of fact dependent on the circumstances of each particular case (*a*). The market price is the criterion ordinarily (*b*), but not when it is shown to be unnaturally inflated or depressed (*c*). If there is no established or ascertainable market price, it is proper to inquire as to what purchasers would be likely to give for the goods, under all the circumstances, with a fair opportunity for competition (*d*).

(*a*) Acebal v. Levy 10 Bing. 376, 383.

(*b*) M'Ewen v. Morey, 60 Ill. 32.
Tucker v. Cady, 25 Ill. App. 578.
Althouse v. Alvord, 28 Wis. 577.
Konitzky v. Meyer, 49 N.Y. 571.

(*c*) Kountz v. Kirkpatrick, 72 Pa. St. 376.
Lovejoy v. Michels, 88 Mich. 15.

(*d*) Morrison v. Smith, 130 Ill. 304, 321.
See also Harrison v. Glover, 72 N.Y. 451.

Where sugar was shipped at the buyer's risk at so much per cwt., and was destroyed before it could be weighed, it was said, if "the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can."

Martineau v. Kitching, L.R. 7 Q.B. pp. 455, 456.
See also Murray v. Stanton, 99 Mass. 345, 348.

As to action for price see r 52 (A).

Rule 7.—(A.) WHERE THERE IS AN AGREEMENT TO SELL GOODS ON THE TERMS THAT THE PRICE IS TO BE FIXED BY THE VALUATION OF A THIRD PARTY, AND SUCH THIRD PARTY CANNOT OR DOES NOT MAKE SUCH VALUATION, THE AGREEMENT CANNOT BE ENFORCED (1); BUT, IF THE GOODS OR ANY PART THEREOF HAVE BEEN DELIVERED TO AND APPROPRIATED BY THE BUYER, HE MUST PAY A REASONABLE PRICE THEREFOR (2).

1. Thurnell v. Balbirnie, 2 M. & W. 786.
   Vickers v. Vickers, L.R. 4 Eq. 529.

2. Clark v. Westrope, 18 C.B. 765, 785.
   Humaston v. Telegraph Co. 20 Wal. 20, 28.
   Kenniston v. Ham, 29 N.H. 501.

Rule 7.—(B.) WHERE SUCH THIRD PARTY IS PREVENTED FROM MAKING THE VALUATION BY THE FAULT OF THE SELLER OR BUYER, THE PARTY NOT IN FAULT MAY MAINTAIN AN ACTION FOR DAMAGES AGAINST THE PARTY IN FAULT.

Such an agreement involves an obligation on the part of each party to do nothing that would prevent the valuation.

See Thurnell v. Balbirnie, 2 M. & W. p. 790.
Mackay v. Dick, 6 App. Cas. 251, 263.

CHAPTER II.

CONDITIONS AND WARRANTIES.

Rule 8.—IN A CONTRACT OF SALE, A CONDITION IS A STIPULATION OR UNDERTAKING, EXPRESSED OR IMPLIED, WHOSE FULFILLMENT MAY BE TREATED AS ESSENTIAL TO THE TRANSFER OF THE PROPERTY IN THE GOODS. SUCH STIPULATION OR UNDERTAKING IS SAID TO BE OF THE ESSENCE OF THE CONTRACT.

By "condition" as distinguished from "warranty" is here meant condition precedent.

The buyer may refuse to accept the goods for non-fulfillment of a condition precedent.

Jones v. United States, 96 U.S. 24, 28.
Pope v. Allis, 115 U.S. 363, 371.

Rule 9—UNLESS A DIFFERENT INTENTION APPEARS FROM THE TERMS OF THE CONTRACT (1), OR THE CIRCUMSTANCES OF THE CASE (2), STIPULATIONS AS TO TIME OF PAYMENT ARE NOT DEEMED TO BE OF THE ESSENCE OF A CONTRACT OF SALE(3). WHETHER ANY OTHER STIPULATION AS TO TIME IS OF THE ESSENCE OF THE CONTRACT OR NOT DEPENDS ON THE CONSTRUCTION OF THE CONTRACT IN VIEW OF THE CIRCUMSTANCES OF THE CASE (4).

1. Bishop v. Shillito, 2 B. & Ald. 329, n.
Miller v. Steen, 30 Cal. 402, 407.
Hess Co. v. Dawson, 149 Ill. 138, 141.

2. As in the case of a ripening crop of peaches to be delivered from day to day, and paid for at the end of each week.

Reybold v. Voorhees, 30 Pa. St. 116.
See also McGrath v. Gegner, 77 Md. 331.

3. Mere delay in payment does not usually go to the root or essence of the contract.

Martindale v. Smith, 1 Q.B. 389, 395.
Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434, 444.
Norrington v. Wright, 115 U.S. p. 210.
Palm v. R.R. Co. 18 Ill. 217, 221.
County v. Overholt 18 Ill. 223, 227.
Hime v. Klasey, 9 Ill. App. 166.
Anglo-Amer. Prov. Co. v. Prentiss, 57 Ill. App. 507.
Winchester v. Newton, 2 Allen, 492, 494.

Myer v. Wheeler, 65 Iowa, 390, 396.
Peirson v. Duncan, 162 Pa. St. 187.

As to the effect of a positive refusal to pay see r 34 (B) n 4.

4. Rommel v. Wingate, 103 Mass. 327, 330.
Higgins v. R. R. Co. 60 N.Y. 553, 556.
Jones v. United States, 96 U.S. 24, 27.
Wilson v. Roots, 119 Ill. 379, 392.

In a mercantile contract a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

Norrington v. Wright, 115 U.S. 188, 203.
Filley v. Pope, 115 U.S. 213.
Cleveland Rolling Mill Co. v. Rhodes, 121 U.S. 255.
Rommel v. Wingate, 103 Mass. 327.
Welsh v. Gossler, 89 N.Y. 540.
Hill v. Blake, 97 N.Y. 216.
Pope v. Porter, 102 N.Y. 366.
Tobias v. Lissberger, 105 N.Y. 404.
Clark v. Fey, 121 N.Y. 470.
Bowes v. Shand, 2 App. Cas. 455, 463.
Reuter v. Sala, 4 C.P.D. pp. 246, 249.
Tascott v. Rosenthal, 10 Ill. App. 639.
Hoover v. Maher, 51 Minn. 269.
And see r 34 (A), n 2.

Rule 10.—IN A CONTRACT OF SALE "MONTH" MEANS PRIMA FACIE CALENDAR MONTH.

Churchill v. Bank, 19 Pick. 535.
Shapley v. Garey, 6 S. & R. p. 540.
Strong v. Birchard, 5 Conn. p. 360.
Gross v. Fowler, 21 Cal. p. 396.
Sheets v. Selden, 2 Wal. p. 189.
Hosley v. Black, 28 N.Y. p. 444.
Rev. St. Ill. ch. 74, §10.

Rule 11.—IN A CONTRACT OF SALE—

(A.) A WARRANTY, IN THE WIDEST SENSE OF THE TERM, INCLUDES ANY STIPULATION OR UNDERTAKING EXPRESSED OR IMPLIED OF THE SELLER WITH REFERENCE TO THE TITLE, QUALITY (1), OR FITNESS FOR A PARTICULAR PURPOSE OF GOODS WHICH ARE THE SUBJECT OF A CONTRACT OF SALE.

(B.) A WARRANTY, IN ITS STRICT AND PROPER SENSE, IS SUCH A STIPULATION OR UNDERTAKING COLLATERAL TO THE TRANSFER OF THE PROPERTY IN THE GOODS TO THE BUYER, THE BREACH OF WHICH GIVES RISE TO A CLAIM FOR DAMAGES, BUT NOT TO A RIGHT TO REJECT THE GOODS AND TREAT THE CONTRACT AS REPUDIATED (2).

1. "Quality" of goods includes their state or condition.

2. A warranty, in the proper sense, as distinguished from a condition, has been defined as "an express or implied statement of something which the party undertakes shall be part of a contract, and though part of the contract yet collateral to the express object of it;" that is to say, collateral to the transfer of the property in the goods.

Chanter v. Hopkins, 4 M. & W. p. 404.
Lunt v. Wrenn, 113 Ill. p. 175.
Wilson v. Lawrence, 139 Mass. p. 321.
Fairbank Canning Co. v. Metzger, 118 N.Y. p. 265.

As a warranty, in its strict sense, is not a condition but a stipulation or undertaking collateral to the transfer of the property in the goods, a breach of it, if there is no fraud and no provision for re-

turn of the property, only entitles the buyer to compensation by way of damages. This is the rule in England and it seems to be supported by the weight of authority in this country.

See r 56 (A), n 5.

Rule 12.—(A.) WHERE A CONTRACT OF SALE IS SUBJECT TO ANY CONDITION TO BE FULFILLED BY THE SELLER, THE BUYER MAY WAIVE THE CONDITION (1), OR MAY ELECT TO TREAT THE BREACH OF SUCH CONDITION AS A BREACH OF WARRANTY, AND NOT AS A GROUND FOR TREATING THE CONTRACT AS REPUDIATED (2).

1. The buyer may waive a condition absolutely.

Defenbaugh v. Weaver, 87 Ill. 132, 137.
Jones v. United States, 96 U.S. p. 28.

Where the fulfillment of a condition by one party is prevented by the other the condition is waived.

Mackay v. Dick, 6 App. Cas. 251.
Smyth v. Craig, 3 W. & S. 14, 20.
McPherson v. Walker, 40 Ill. 371.
United States v. Peck, 102 U.S. 64.

2. One and the same stipulation may be both a condition and a warranty in the widest sense of the term, while the contract is executory (*a*), and become a warranty, in its strict sense, when the contract is executed or becomes a sale by the transfer of the property in the goods to the buyer;

as where in an agreement to sell there is a stipulation as to the quality of the goods which is also a condition precedent, and the stipulation so far as it is a condition is waived by the acceptance of the goods (*b*).

It was so held in the case of an agreement to sell and deliver "good, clear, merchantable ice"(*c*).

(*a*) Pope v. Allis, 115 U.S. p. 371.
Shields v. Reibe, 9 Ill. App. p. 602.
Forbes v. Pausinsky, 14 Ill. App. p. 21.

(*b*) Behn v. Burness, 3 B. & S. p. 755.
Heilbutt v. Hickson, L.R. 7 C.P. p. 450.
Wolcott v. Mount, 36 N.J.L. p. 265.
Morse v. Stock Yard Co. 21 Oregon, p. 293.

(*c*) Morse v. Moore, 83 Me. 475, 479.
See also Brigg v. Hilton, 99 N.Y. 517, 529.
Fairbank Canning Co. v. Metzger, 118 N.Y. 260.
Holloway v. Jacoby, 120 Pa. St. 583.
Forcheimer v. Stewart, 65 Iowa, 593, 599.

And see r 56 (A).

Rule 12—(B.) WHETHER A STIPULATION IN A CONTRACT OF SALE IS A CONDITION, THE BREACH OF WHICH MAY GIVE RISE TO A RIGHT TO TREAT THE CONTRACT AS REPUDIATED (1), OR A WARRANTY, THE BREACH OF WHICH MAY GIVE RISE TO A CLAIM FOR DAMAGES BUT NOT TO A RIGHT TO REJECT THE GOODS AND TREAT THE CONTRACT AS REPUDIATED (2), DEPENDS IN EACH CASE ON THE CONSTRUCTION OF THE CONTRACT (3). A STIPULATION MAY BE A CONDITION, THOUGH CALLED A WARRANTY IN THE CONTRACT.

1. See Graves v. Legg, 9 Exch. 709.
Bowes v. Shand, 2 App. Cas. 455.
Cleveland Rolling Mill Co. v. Rhodes, 121 U.S. 255.

2. See Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434, 444.

3. Behn v. Burness, 3 B. & S. p. 754.
Bentsen v. Taylor, (1893) 2 Q.B. pp. 280, 281.
Lowber v. Bangs, 2 Wal. 736.
Jones v. United States, 96 U.S. 24, 27.

Rule 12.—(C.) WHERE A CONTRACT IS NOT SEVERABLE (1), AND THE BUYER HAS ACCEPTED THE GOODS, OR A SUBSTANTIAL PART THEREOF, WITH FULL MEANS OF PREVIOUSLY ASCERTAINING WHETHER THEY CONFORMED TO THE CONTRACT (2), OR WHERE THE CONTRACT IS FOR SPECIFIC GOODS, THE PROPERTY IN WHICH HAS PASSED TO THE BUYER (3), THE BREACH OF ANY CONDITION TO BE FULFILLED BY THE SELLER CAN ONLY BE TREATED AS A BREACH OF WARRANTY, AND NOT AS A GROUND FOR REJECTING THE GOODS AND TREATING THE CONTRACT AS REPUDIATED, UNLESS THERE BE A TERM OF THE CONTRACT, EXPRESS OR IMPLIED, TO THAT EFFECT (4).

1. If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire (*a*). So if the purchase is of goods as a particular lot, even if the price is to be ascertained by the number of pounds in the lot, or the number of barrels in which the goods are packed, the contract is also held to be entire (*b*).

(*a*) Miner v. Bradley, 22 Pick. 457.
Norris v. Harris, 15 Cal. 226, 256.
Roddin v. Shurley, 66 Ill. 25.
Kingman v. Meeks, 56 Ill. App. 279.

(*b*) Clark v. Baker, 5 Met. 452.
Young, etc. Mfg. Co. v. Wakefield, 121 Mass. p. 92.

Where many different articles are sold at the same time for distinct prices, even if they are articles of the same general description, so that a statement that they are all of a particular quality would apply to each, the contract is generally treated as severable, so as to permit the buyer to accept the articles which are in accordance with the contract and reject the rest.

Norris v. Harris, 15 Cal. 226, 256.
Young, etc. Mfg. Co. v. Wakefield, 121 Mass 91.
Pierson v. Crooks, 115 N.Y. 539, 554.
Tipton v. Feitner, 20 N.Y. 423.
Bank of Antigo v. Trust Co. 149 Ill. 343, 348.
Potsdamer v. Kruse (Minn. 1894), 58 N.W. Rep. 983.

2 Lyon v. Bertram, 20 How. 149, 154.
Norrington v. Wright, 115 U.S. p. 205.
Behn v. Burness, 3 B. & S. p. 755.
Heilbutt v. Hickson, L.R. 7 C.P. 438.
Wolf v. Dietzsch, 75 Ill. 205.
Harzfeld v. Converse, 105 Ill. 534.
Brigg v. Hilton, 99 N.Y. p. 529.

3. Behn v. Burness, 3 B. & S. p. 755.
Heilbutt v. Hickson, L.R. 7 C.P. p. 449.
Heyworth v. Hutchinson, L.R. 2 Q.B. 447, 450.
Shields v. Reibe, 9 Ill. App. 598, 603.
Brigg v. Hilton, 99 N.Y. p. 529.

4. Bannerman v. White, 10 C.B. N.S. 844, 860
Dallum v. Birdsall, 66 Ill. 378.
Owens v. Sturges, 67 Ill. p. 367.
Mayes v. Rogers, 47 Ill. App. p. 375.

Rule 12.—(D.) *EXPLANATION:* NOTHING IN THIS RULE AFFECTS THE CASE OF ANY CONDITION OR WARRANTY, FULFILLMENT OF WHICH IS EXCUSED BY LAW BY REASON OF IMPOSSIBILITY (1) OR OTHERWISE (2).

1. As to impossibility see:

Bailey v. De Crespigny, L.R. 4 Q.B. 185.
Jones v. United States, 96 U.S. p. 29.
Cordes v. Miller, 39 Mich. 581.
See also rs 4, 5.

2. As to illegality see:

Benjamin, Principles of Contract, Ch. VI.

Rule 13.—ANY AFFIRMATION OF A MATERIAL FACT RESPECTING THE TITLE, QUALITY, OR FITNESS FOR A PARTICULAR PURPOSE, OF THE GOODS (1), (NOT A MERE EXPRESSION OF OPINION OR BELIEF (2),) MADE BY THE SELLER DURING THE NEGOTIATION FOR THE SALE (3), EVINCING UNDER THE CIRCUMSTANCES AN INTENTION TO ASSURE THE BUYER OF THE TRUTH OF THE FACT AFFIRMED (4), IF SO RECIEVED AND RELIED ON BY THE BUYER (5), IS AN EXPRESS CONDITION OR WARRANTY, AS THE CASE MAY BE.

QUALIFICATION: WHERE A CONTRACT OF SALE IS REDUCED INTO WRITING, EVIDENCE OF AN ORAL CONDITION OR WARRANTY IS NOT ADMISSIBLE (6).

1. No particular word or form of expression is necessary to create a warranty. A positive rep-

resentation in relation to a matter of fact may be sufficient (*a*); as an assertion that a horse is sound (*b*), or that he is all right (*c*).

(*a*) Robinson v. Harvey, 82 Ill. 58.
Henshaw v. Robins, 9 Met. 88.
Austin v. Nickerson, 21 Wis. 544.
Polhemus v. Heiman, 45 Cal. 573.
Warren v. Coal Co., 83 Pa. St. 440.
Groetzingers v. Kann, 165 Pa. St. 578.

(*b*) Chapman v. Murch, 19 Johns. 290.
Roberts v. Morgan, 2 Cow. 438.
Roberts v. Jenkins, 21 N.H. 118.
Woodbury v. Robbins, 10 Cush. 520.
Washburn v. Cuddihy, 8 Gray, 430.
Brown v. Bigelow, 10 Allen, 242.
Kenner v. Harding, 85 Ill. 264.
Holliday v. Morgan, 1 E. & E. 1.

(*c*) Smith v. Justice, 13 Wis. 600.
Kingsley v. Johnson, 49 Conn. 462.
McClintock v. Emick, 87 Ky. 160.
Powell v. Chittick (Iowa, 1893), 56 N.W. Rep. 652.

2. Shackelton v. Lawrence, 65 Ill. 175, 177.
Carondelet Iron Works v. Moore, 78 Ill. 65, 71.
Bryant v. Crosby, 40 Me. 9, 18.
Baker v. Henderson, 24 Wis. 509, 510.

As where the representation relates to the value of a horse or painting, for in such cases the representation is to be regarded as an expression of opinion, rather than such an affirmation of a fact as will amount to a warranty, unless there are other declarations which leave no doubt of the intention to warrant.

Towell v. Gatewood, 2 Scam. p. 25.
Reed v. Hastings, 61 Ill. p. 267.
Uhler v. Semple, 20 N.J. Eq. p. 291.
Poland v. Brownell, 131 Mass. p. 141-2.
Collins v. Jackson, 54 Mich. p. 191.

In order to constitute a warranty the representation must enter into and form an essential element in the consideration of the bargain (*a*)

Where there was a sale of mining stock to one wholly ignorant of its value, a statement that the stock was readily selling at a dollar a share was held to be more than a mere expression of opinion. This was a statement of fact and such as would undoubtedly have a material influence upon the purchaser (*b*).

(*a*) Adams v. Johnson, 15 Ill. 345, 346.

(*b*) Maxted v. Fowler, 94 Mich. 106.

"In determining whether there was in fact a warranty, the decisive test is, whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case, there is a warranty; in the latter, not."

Kenner v. Harding, 85 Ill. 264, 268.
Roberts v. Applegate, 153 Ill. 210, 216.

3. Wilmot v. Hurd, 11 Wend. 584.
Way v. Martin, 140 Pa. St. 499.
Hobart v. Young, 63 Vt. 363.
Crossman v. Johnson, 63 Vt. 333.

The original consideration is sufficient if the warranty is given before the contract of sale is completed. It was so held where the warranty was given after the delivery of ordered goods, but before the price was agreed upon (*a*). So also where the warranty was put into writing after

delivery of a bill of sale, but in pursuance of the original contract (*b*).

(*a*) Vincent v. Leland, 100 Mass. 432.

(*b*) Collette v. Weed, 68 Wis. 428.
Spalding v. Conant, 146 Mass. 292.
McGaughey v. Richardson, 148 Mass. 608.
And see Vogel v. Scott, 66 Ill. 426.

A statement made after a sale may afford proof of a warranty given at the time of the sale (*a*). But a written and different warranty, gratuitously delivered after a sale, will not supersede an oral warranty given at the time of the sale (*b*).

(*a*) Tuttle v. Brown, 4 Gray 457.

(*b*) Aultman v. Kennedy, 33 Minn. 339.

Where a warranty is given after the contract of sale is completed, it must be supported by fresh consideration.

Hogins v. Plympton, 11 Pick. 99.
Bloss v. Kittridge, 5 Vt. 28.
Towell v. Gatewood, 2 Scam. 22.
Roscorla v. Thomas, 3 Q.B. 234.
Summers v. Vaughan, 35 Ind. 323.
Cady v. Walker, 62 Mich. 157.

If a warranty does not constitute a part of the contract of sale when the contract is completed, there is nothing to support the warranty in the absence of a new consideration. The fresh consideration may be the acceptance of goods which the buyer has the right to reject for default of the seller; as where the seller, in consideration of the buyer's accepting trees tendered too late, warrants them against injury from freezing.

Congar v. Chamberlain, 14 Wis. 258, 264.
And see Douglass v. Moses (Iowa, 1893), 56 N.W. Rep. 271.

4. Reed v. Hastings, 61 Ill. 266, 267.
Hawkins v. Pemberton, 51 N.Y. 198, 202.
Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 265.
McClintock v. Emick, 87 Ky. 160, 166.
Herron v. Dibrell 87 Va. 289, 296.
Whitehead Machine Co. v. Ryder, 139 Mass. 366, 370
Shippen v. Bowen, 122 U.S. 581.
Hobart v. Young, 63 Vt. 369.

If the seller made an assertion of that nature, which he apparently intended the buyer should receive as a fact, and the assertion was so received and relied on by the buyer, that is sufficient (*a*). The seller is responsible for the language he uses and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the buyer (*b*). The intention with which a representation is made is to be determined by the character of the representation made and the object to be effected by it (*c*).

(*a*) Morrill v. Wallace, 9 N.H. 111, 115.
Smith v. Justice, 13 Wis. 600, 602.
Stroud v. Pierce, 6 Allen, 416.
Crenshaw v. Slye, 52 Md. 146.

(*b*) Hawkins v. Pemberton, 51 N.Y. p. 202.
Neave v. Arntz, 56 Wis. 176.

(*c*) Reed v. Hastings, 61 Ill. 266.

5. While there may be a *special* warranty against the consequences growing out of a patent defect, it is held that a *general* warranty does not extend to defects made known to the buyer, or apparent on casual observation, and which cannot but be

understood by him to their full extent; as where a horse is warranted perfect and wants a tail or an ear; for it will not be presumed that the parties intended to embrace in the general terms employed in the contract, imperfections well known to both, or so plainly visible and obvious as that they must be presumed to have been known by the buyer (*a*).

But this has no application where the buyer cannot understand the true nature and extent of the defect without special skill or experience (*b*), or where the seller uses artifice and thereby conceals the defect (*c*), or where the defect is not discoverable without special diligence (*d*), or where the seller gives a special warranty against a specified defect (*e*).

Without doubt there may be a special warranty where a purchaser buys upon his own judgment, and yet for his own protection desires and obtains the benefit of it (*f*). Even if, in his own judgment, the article is not what it is represented, he may see fit to purchase it, and rely upon a special warranty that it is so. But such warranty must be made in explicit terms. To give force to the warranty that is inferrible from affirmation as to the essential qualities of the articles sold, it is necessary that the truth of the thing affirmed should be relied upon to an appreciable extent (*g*). It is sufficient if the buyer would not have made the purchase but for such affirmation, though he may have relied in part on other circumstances (*h*).

(*a*) Fisher v. Pollard, 2 Head, 314, 316.
Leavitt v. Fletcher, 60 N.H. 182.
M'Cormick v. Kelly, 28 Minn. 135.

(*b*) Shewalter v. Ford, 34 Miss. 417, 422.
Hill v. North, 34 Vt. 604.

Brown v. Bigelow, 10 Allen, 242, 244.
Margetson v. Wright, 8 Bing. 454.
Branson v. Turner, 77 Mo. 489.
Storrs v. Emerson, 72 Iowa, 390.
Thompson v. Harvey, 86 Ala. 519.

(*c*) Kenner v. Harding, 85 Ill. 264, 268.
Chadsey v. Greene, 24 Conn. 562, 572.
Tabor v. Peters, 74 Ala. 90, 98.

(*d*) Meickley v. Parsons, 66 Iowa, 63.
Drew v. Edmunds, 60 Vt. 401.
Miller v. Moore, 83 Ga. 684.
And see Buffalo Wire Co. v. Phillips, 67 Wis. 132.

(*e*) Pinney v. Andrus, 41 Vt. 631, 641.
Watson v. Roode, 30 Neb. 264.
Fitzgerald v. Evans, 49 Minn. 541.

(*f*) Harrington v. Smith, 138 Mass. p. 98.
Smith v. Hale, 158 Mass. 178.
Eureka Fertilizer Co. v. Smelt. & Roll. Co. 78 Md. 179

(*g*) Harrington v. Smith, 138 Mass. 92, 98.
Hawkins v. Berry, 5 Gilm. 36, 39.

(*h*) Ruff v. Jarrett, 94 Ill. 475, 480.
Hicks v. Stevens, 121 Ill. 186, 193.

6. Harnor v. Groves, 15 C.B. 667.
Mumford v. M'Pherson, 1 Johns, 414.
Eighmie v. Taylor, 98 N.Y. 288.
Dean v. Mason, 4 Conn. 428.
Mullain v. Thomas, 43 Conn. 252.
Dutton v. Gerrish, 9 Cush. 89.
Frost v. Blanchard, 97 Mass. 155.
De Witt v. Berry, 134 U.S. 306.
Seitz v. Machine Co. 141 U.S. 510.
Robinson v. McNeill, 51 Ill. 225.
Titley v. Stone Co. 127 Ill. 457.
Shepherd v. Gilroy, 46 Iowa, 193.
Naumberg v. Young, 44 N.J.L. 331.
Thompson v. Libby, 34 Minn. 374.
Warren Glass Works v. Coal Co. 65 Md. 547.

McQuaid v. Ross, 77 Wis. 470.
Case Plow Works v. Niles (Wis. 1895), 63 N.W. Rep. 1013.
Storage Co. v. Woods, 99 Mich. 269.

"It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol."

Pickering v. Dowson, 4 Taunt. p. 784.

Otherwise, if the writing indicates that only a part of the contract is reduced to writing; as where a mere receipt or bill of parcels is given.

Allen v. Pink, 4 M. & W. 140.
Filkins v. Whyland, 24 N.Y. 338.
Perrine v. Cooley, 39 N.J.L. 449.
Dunham v. Barnes, 9 Allen, 352.
Atwater v. Clancy, 107 Mass. 369.
Ruff v. Jarrett, 94 Ill. 475.
And see Eureka Fertilizer Co. v. Smelt. & Roll. Co. 78 Md. 179.

So also an oral warranty may be shown notwithstanding the existence of a conditional written warranty, if the latter is void on the ground that its acceptance was procured by fraud.

Aultman v. Falkum, 51 Minn. 562.

And in an action for deceit parol evidence is admissible to show that the contract of sale was induced by a false and *fraudulent* oral warranty.

Tabor v. Peters, 74 Ala. 90, 95.
Mumford v. M'Pherson, 1 Johns. p. 418.
Krumbhaar v. Birch, 83 Pa. St. p. 428.
Antle v. Sexton, 32 Ill. App. 437.

Rule 14.—IN A CONTRACT OF SALE (1), UNLESS THE CIRCUMSTANCES OF THE CONTRACT ARE SUCH AS TO SHOW A DIFFERENT INTENTION (2), THERE IS—

(A.) AN IMPLIED CONDITION ON THE PART OF THE SELLER THAT IN THE CASE OF A SALE HE HAS A RIGHT TO SELL THE GOODS, AND THAT IN THE CASE OF AN AGREEMENT TO SELL HE WILL HAVE A RIGHT TO SELL THE GOODS, AT THE TIME WHEN THE PROPERTY IS TO PASS (3).

(B.) AN IMPLIED WARRANTY THAT THE BUYER SHALL HAVE AND ENJOY QUIET POSSESSION OF THE GOODS AS AGAINST THE SELLER AND THE LAWFUL ACTS OF THIRD PARTIES (4).

(C). AN IMPLIED WARRANTY THAT THE GOODS SHALL BE FREE FROM ANY CHARGE OR ENCUMBRANCE IN FAVOR OF ANY THIRD PARTY, NOT DECLARED OR KNOWN TO THE BUYER BEFORE OR AT THE TIME WHEN THE CONTRACT IS MADE (5).

1. The rule also applies to a contract of exchange.

Bixler v. Saylor, 68 Pa. St. 146.
Hunt v. Sackett, 31 Mich. 18.
Patee v. Pelton, 48 Vt. 182.
Byrnside v. Burdett, 15 W.Va. 702.

2. See r 15.

3. Eichholz v. Bannister, 17 C.B. N.S. 708.
Wood v. Sheldon, 42 N.J.L. 421, 424.
Gould v. Bourgeois, 51 N.J.L. 361, 372.
Sherman v. Transportation Co. 31 Vt. 162, 175.
Brown v. Pierce, 97 Mass. 46, 49.
Defreeze v. Trumper, 1 Johns. 274.

Randon v. Toby, 11 How. 493, 520.
Woodruff v. Thorne, 49 Ill. 88.
Morris v. Thompson, 85 Ill. p. 18.
Marshall v. Duke, 51 Ind. 62.
Sanborn v. Jackman, 60 N.H. 569.
Siegel v. Brooke, 25 Ill. App. 207.

In almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale (*a*). This is clearly so where one sells or agrees to sell as his own goods in his possession (*b*). The word "possession" is here used in its broadest sense as including possession by a bailee or agent of the seller (*c*).

(*a*) Eichholz v. Bannister, 17 C.B. N.S. p. 723.

(*b*) Coolidge v. Brigham, 1 Met. 551.
Starr v. Anderson, 19 Conn. 338.
Burt v. Dewey, 40 N.Y. 283, 285.
People's Bank v. Kurtz, 99 Pa. St. 344, 348.
Burgess v. Wilkinson, 13 R.I. 646, 648.
Edgerton v. Michels, 66 Wis. 124, 131.
Paulsen v. Hall, 39 Kan. 365, 368.

(*c*) Whitney v. Heywood, 6 Cush. 86.
Shattuck v. Green, 104 Mass. 42, 45.

4. Linton v. Porter, 31 Ill. 107.
Dresser v. Ainsworth, 9 Barb. 619.
Burt v. Dewey, 40 N.Y. p. 285.
And see Danforth v. Clary, 49 Ill. App. 523.

"This is analogous to a covenant for quiet enjoyment of land. The effect of such a warranty is to guarantee the purchaser against eviction or injury from (the lawful acts) of other parties."

McGiffin v. Baird, 62 N.Y. p. 331.

5. The implied undertaking of the seller is not confined to the right to sell, but extends to a

prior lien or incumbrance—to a partial as well as total failure of title.

Sargent v. Currier, 49 N.H. 311.
Lane v. Romer, 2 Chandler, (Wis.) 65.
Close v. Crossland, 47 Minn. 500.

It is not excluded by a bill of sale which is silent on the question.

Trigg v. Faris, 5 Humph. 343.
Word v. Cavin, 1 Head, 506.
Miller v. Van Tassel, 24 Cal. 458.

Where the goods have been delivered to the buyer, under the contract of sale, he is not entitled to substantial damages for breach of the warranty of title until the superior right or interest has been asserted, and, under the pressure thereof, he has surrendered the possession or yielded to the claim.

The third party may never enforce his right, or the seller may adjust the claim.

Case v. Hall, 24 Wend. 102, 103.
Burt v. Dewey, 40 N.Y. 283, 285.
McGiffin v. Baird, 62 N.Y. 329, 331.
O'Brien v. Jones, 91 N.Y. 193, 197.
Cahill v. Smith, 101 N.Y. 355, 357.
Randon v. Toby, 11 How. 493, 520.
Bennett v. Bartlett, 6 Cush. 225, 227.
Word v. Cavin, 1 Head, 506, 510.
Wanser v. Messler, 29 N.J.L. 256.
Linton v. Porter, 31 Ill. 107.
Gross v. Kierski, 41 Cal. 111, 113.
Krumbhaar v. Birch, 83 Pa. St. 426.
Matheny v. Mason, 73 Mo. 677, 683.
Johnson v. Oehmig, 95 Ala. 189.
Close v. Crossland, 47 Minn. 500, 502.
But see Grose v. Hennessey, 13 Allen, 389.
Perkins v. Wheelan, 116 Mass. 542.

Rule 15.—THERE IS NO IMPLIED UNDERTAKING AS TO THE TITLE OF THE GOODS UNDER THE FOLLOWING CIRCUMSTANCES:

(A.) WHERE THE GOODS, AT THE TIME WHEN THE CONTRACT IS MADE, ARE OUT OF THE POSSESSION OF THE SELLER AND ARE CLAIMED, OR LIKELY TO BE CLAIMED, BY ANOTHER (1).

(B.) WHERE THE CONTRACT DOES NOT PURPORT TO BE A SALE OF THE GOODS, BUT IS A MERE ASSIGNMENT OF ALL THE SELLER'S RIGHT OR INTEREST IN THE GOODS (2).

(C.) WHERE THE GOODS ARE SOLD WITH NOTICE TO THE BUYER OF AN OUTSTANDING INTEREST THEREIN (3).

(D.) WHERE THE BUYER EVIDENTLY ASSUMES THE RISK OF THE TITLE (4).

(E.) WHERE THE GOODS ARE SOLD IN AN OFFICIAL OR KNOWN REPRESENTATIVE CAPACITY; AS BY AN OFFICER OF THE COURT (5), EXECUTOR OR ADMINISTRATOR (6), GUARDIAN (7), PLEDGEE, MORTGAGEE, OR TRUSTEE (8), OR AGENT KNOWN TO BE ACTING AS SUCH (9).

1. Andres v. Lee, 1 Dev. & Bat. Eq. 318.
   Scott v. Hix, 2 Sneed, 192.
   Huntingdon v. Hall, 36 Me. 501, 502.

2. Chapman v. Speller, 14 Q.B. 621.
   Jones v. Huggeford, 3 Met. 519.
   Nat. Bank v. Loan & Trust Co. 123 Mass. 330.
   Krumbhaar v. Birch, 83 Pa. St. 427.
   Gould v. Bourgeois, 51 N.J.L. 361.

3. Bogert v. Chrystie, 24 N.J.L. 60.
   Barbee v. Williams, 4 Heisk. 522.

4. McCoy v. Artcher, 3 Barb. 331.
   Porter v. Bright, 82 Pa. St. 441.

5. The Monte Allegre, 9 Wheat. 616, 645.
   Forsythe v. Ellis, 4 J.J. Marsh. 298.
   Morgan v. Fencher, 1 Blackf. 10.
   Rodgers v. Smith, 2 Ind. 526.
   Bartholomew v. Warner, 32 Conn. 98.
   Hicks v. Skinner, 71 N. Car. 539.
   Johnson v. Laybourn (Minn. 1894), 57 N.W. Rep. 933.

6. Mockbee v. Gardner, 2 Har. & G. 176.
   Bingham & Maxcy, 15 Ill. 295.

7. Storm v. Smith, 43 Miss. 497.

8. Morley v. Attenborough, 3 Exch. 513.
   Sheppard v. Earles, 13 Hun, 651.
   Harris v. Lynn, 25 Kan. 281.
   Cohn v. Ammidown, 120 N.Y. 398.

9. Irwin v. Thompson, 27 Kan. 643.
   Page v. Cowasjee, L.R. 1 P.C. p. 144.

Rule 16.—WHERE THERE IS A CONTRACT FOR THE SALE OF GOODS BY DESCRIPTION, THERE IS AN IMPLIED CONDITION THAT THE GOODS SHALL CORRESPOND WITH THE DESCRIPTION (1); AND IF THE SALE BE BY SAMPLE, AS WELL AS BY DESCRIPTION, IT IS NOT SUFFICIENT THAT THE BULK OF THE GOODS CORRESPONDS WITH THE SAMPLE, IF THE GOODS DO NOT ALSO CORRESPOND WITH THE DESCRIPTION (2).

1. Wieler v. Schilizzi, 17 C.B. 619, 624.
   Josling v. Kingsford, 13 C.B.N.S. 447.
   Winsor v. Lombard, 18 Pick. 60.
   Avery v. Miller, 118 Mass. 500.

Dailey v. Green, 15 Pa. St. 125.
Wolf v. Dietzsch, 75 Ill. 205.
Forbes v. Pausinsky, 14 Ill. App. 21.
White v. Miller, 71 N.Y. 129.
Pope v. Allis, 115 U.S. 363, 371.
Fogg v. Rodgers, 84 Ky. 558.
White Bronze Co. v. Gillette, 88 Mich. 231.

A contract for the sale of peas is not complied with by a tender of beans. If the article tendered does not reasonably answer the description in the contract, it is not the article bargained for, and the bargainee is not bound to take it.

Bowes v. Shand, 2. App. Cas. 455, 480.

The time of the shipment of the goods may form part of their description (*a*). But shipment *by the seller* is *prima facie* unnecessary, if the goods otherwise fulfill the condition (*b*).

(*a*) See r 9, n 4.

(*b*) Cunningham v Judson, 100 N.Y. 179.

Where the goods have been delivered this implied condition may be treated by the buyer as an affirmation amounting to a warranty that the goods are what they are described to be.

Hastings v. Lovering 2 Pick. 214.
Henshaw v. Robins, 9 Met. 83.
Borrekins v. Bevan, 3 Rawle, 23.
Holloway v. Jacoby, 120 Pa. St. 583.
Hawkins v. Pemberton, 51 N.Y. 198.
White v. Miller, 71 N.Y. 118, 128.
Wolcott v. Mount, 36 N.J.L. 262; S.C. 38 N.J.L. 496.
Morse v. Moore, 83 Me, 473.
Bagley v. Rolling Mill Co. 21 Fed. 159, 162.
Jones v. George, 61 Tex. 345.
Forcheimer v. Stewart, 65 Iowa, 593, 598.
Drew v. Ellison, 60 Vt. 401.
Morse v. Stock Yard Co. 21 Oregon, 289.

The following descriptions are fair illustrations of the rule: "Winter-pressed sperm oil" (*a*); "Haxall flour" (*b*); "large Bristol cabbage seed" (*c*); "strained rosin" (*d*); "No. 2 white mixed corn, bulk" (*e*); "Paris green" (*f*).

(*a*) Osgood v. Lewis, 2 Har. & G. 495.

(*b*) Flint v. Lyon, 4 Cal. 17.

(*c*) White v. Miller, 71 N.Y. 118.

(*d*) Lewis v. Rountree, 78 N.C. 323.

(*e*) Miller v. Moore, 83 Ga. 684.

(*f*) Jones v. George, 61 Tex. 345.

2. In *Nichol* v. *Godts*, 10 Exch. 191, it was held that a contract for the sale of "foreign refined rape oil warranted only equal to samples," was not complied with by the tender of oil which corresponded with the samples, but was not "foreign refined rape oil."

So, in *Gould* v. *Stein*, 149 Mass. 570, it was held that a contract for the sale of "102 bales Ceara scrap rubber, as per samples, * * * of second quality," was broken by a failure to deliver rubber of second quality, irrespective of whether it was equal to the samples.

See also Azemar v. Casella, L.R. 2 C.P. p. 447; S.C. L. R 2 C.P. 677, 678
Bach v. Levy. 101 N.Y. 511, 514.

Rule 17.—AS A GENERAL RULE (1) THERE IS NO IMPLIED WARRANTY OR CONDITION AS TO THE QUALITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF GOODS SUPPLIED UNDER A CONTRACT OF SALE (2).

1. For exceptions see r 18.

2. Barr v. Gibson, 3 M. & W. 399.
Chanter v. Hopkins, 4 M. & W. 399.
Wright v. Hart, 18 Wend. 449.
Moses v. Mead, 1 Denio, 378.
Hargous v. Stone, 5 N.Y. 82.
Mixer v. Coburn, 11 Met. 559.
Misner v. Granger, 4 Gilm. 69, 73.
Morris v. Thompson, 85 Ill. 16, 18.
Cogel v. Kniseley, 89 Ill. 598.
Eagan v. Call, 34 Pa. St. 236.
Warren v. Coal Co. 83 Pa. St. 439.
Davis v. Murphy, 14 Ind. 158.
Miller v. Tiffany, 1 Wal. 309.
Barnard v. Kellogg, 10 Wal. 383.
Dean v. Mason, 4 Conn. 428.
Frazier v. Harvey, 34 Conn. 469.
Drew v. Roe, 41 Conn. 41.
Moore v. McKinlay, 5 Cal. 471.
Tilton Safe Co. v. Tisdale, 48 Vt. 83.

"No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies."

Barnard v. Kellogg, 10 Wal. p. 388.

Rule 18.—THE FOLLOWING ARE THE PRINCIPAL EXCEPTIONS TO THE PRECEDING RULE (1):

(A.) WHERE THE BUYER ORDERS GOODS FOR A PARTICULAR PURPOSE, WHICH HE, EXPRESSLY OR BY IMPLICATION (2), MAKES KNOWN TO THE SELLER SO AS TO SHOW (3) THAT THE BUYER RELIES ON THE SELLER'S SKILL OR JUDGMENT (4), AND THE GOODS ARE OF A DESCRIPTION WHICH IT IS IN THE COURSE OF THE SELLER'S BUSINESS TO SUPPLY (WHETHER HE BE THE MANUFACTURER OR NOT) (5), THERE IS AN IMPLIED CONDITION THAT THE GOODS SHALL BE REASONABLY (6) FIT FOR SUCH PURPOSE (7), PROVIDED THAT IN THE CASE OF A CONTRACT FOR THE SALE OF A SPECIFIED ARTICLE UNDER ITS PATENT OR OTHER TRADE NAME, THERE IS NO IMPLIED CONDITION AS TO ITS FITNESS FOR ANY PARTICULAR PURPOSE (8).

1. "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is, in all cases, founded upon the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side."

The Moorcock, 14 P.D. p. 68.

2. The purpose for which goods are required may be indicated by the very designation of the

goods; *e.g.*, "coatings," a term necessarily importing that the goods are intended to be made up into coats.

Drummond v. Van Ingen, 12 App. Cas. p. 293.
Jones v. Padgett, 24 Q.B.D. p. 655.

3. Where one sells an article for a particular purpose, and undertakes that it shall be sufficient for the purpose, it is a breach of his contract if it is not so. The case does not materially differ when, having full knowledge of the purpose of the buyer, that purpose is adopted as the basis of the contract, either by express language or in any other way (*a*). But the particular use which is to be made of the article must be made known by the buyer at the time of the contract, in such a way as to indicate a purpose to put upon the seller the responsibility of furnishing an article reasonably fit for the purpose to which it is to be applied (*b*).

(*a*) Wilson v. Lawrence, 139 Mass. 321.

(*b*) Hight v. Bacon, 126 Mass. p. 13.
Jones v. Padgett, 24 Q.B.D. 650.

4. It is otherwise where the buyer relies on his own skill or judgment as where he directs in what manner or of what material an article shall be made.

Ricketts v. Sisson, 9 Dana, 358.
Cunningham v. Hall, 4 Allen, 268, 273.
Mattoon v. Rice, 102 Mass. 236.
Archdale v. Moore, 19 Ill. 565.
Shoenberger v. McEwen 15 Ill. App. 496.

And if a person orders a specified article for a special purpose, and the dealer informs him that he has no personal knowledge of the article or of

its fitness, it can not be said that the buyer relies on the skill or judgment of the dealer.

Englehardt v. Clanton, 83 Ala. 336, 343.

5. Brown v. Edgington, 2 M. & Gr. 279, 292, 293.
Jones v. Just, L.R. 3 Q.B. p. 202.
Dushane v. Benedict, 120 U.S. 630, 636.
Van Wyck v. Allen, 69 N.Y. 61.
Englehardt v. Clanton, 83 Ala. 336, 342.
Shaw v. Smith, 45 Kan. 334.
Omaha Coal Co. v. Fay, 37 Neb. 68, 75.
Edwards v. Dillon, 147 Ill. p. 23.

So held where stock cattle were sent to a butcher on his order for "two car-loads of good beef cattle"(*a*); and where unmarketable hogs were furnished on an order for nine hogs to make up a carload of hogs for shipment to and sale in market (*b*).

(*a*) Morse v. Stock Yard Co. 21 Oregon. 289.

(*b*) Best v. Flint, 58 Vt. 543.

6. Pacific Iron Works v. Newhall, 34 Conn. 67.
Harris v. Waite, 51 Vt. 480.
Conant v. Bank of Terre Haute, 121 Ind. 323.
Breen v. Moran, 51 Minn. 525.

7. Examples: Where the manufacturer undertook to furnish specially copper for sheathing a vessel (*a*); a carriage pole for a carriage (*b*); a pump for a mine (*c*); engines for a steamboat (*d*); boxes for pressing tobacco (*e*); a windmill for a designated place (*f*); trucks and tram-car wheels for a tram road (*g*).

(*a*) Jones v. Bright, 5 Bing. 533.

(*b*) Randall v. Newson, 2 Q.B.D. 102.

(*c*) Gatey v. Rountree, 2 Chandler, (Wis.) 28.

(*d*) Fisk v. Tank, 12 Wis. 276.

(e) Gerst v. Jones, 32 Grattan, 518.

(f) McClamrock v. Flint, 101 Ind. 278.

(g) Curtis Mfg. Co. v. Williams, 48 Ark. 325.

8. Where a known, described, and defined article is ordered of a manufacturer or dealer, although it is stated to be required by the buyer for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no undertaking that it shall answer the particular purpose intended by the buyer (a). In short, an undertaking as to fitness is not implied where the buyer gets what he bargains for, though it does not answer his purpose (b).

(a) Jones v. Just, L.R. 3 Q.B. p. 202.
Chanter v. Hopkins, 4 M. & W. 399.
Ollivant v. Bayley, 5 Q.B. 288.
DeWitt v. Berry, 134 U.S. 306, 313.
Seitz v. Machine Co. 141 U.S. 510, 518.
Dickson v. Jordan, 11 Ired. L. 166.
Port Carbon Iron Co. v. Groves, 68 Pa. St. 149.
Dounce v. Dow, 64 N.Y. 411.
Gachet v. Warren, 72 Ala. 288.
McLauthlin v. Wilder, 138 Mass. 393, 397.
Warren Glass Works v. Coal Co. 65 Md. 547, 553.
Wis. Brick Co. v. Hood, 54 Minn. 543, 548; S.C. 62 N. W. Rep. 550.
Storage Co. v. Woods, 99 Mich. 269.
Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 124.
Case Plow Works v. Niles (Wis. 1895), 63 N.W. Rep. 1013.
Jarecki Mfg. Co. v. Kerr, 165 Pa. St. 529.
Diebold Safe Co. v. Huston (Kan. 1895), 39 Pac. Rep. 1035.

(b) Goulds v. Brophy, 42 Minn. 109, 111.
Mason v. Chappell, 15 Grattan, 572, 586.
Gossler v. Sugar Refinery, 103 Mass. 331, 333.

Rule 18.—(B.) WHERE GOODS ARE ORDERED BY DESCRIPTION FROM A SELLER WHO DEALS IN GOODS OF THAT DESCRIPTION (WHETHER HE BE THE MANUFACTURER OR NOT) (1), AND THE BUYER HAS NO OPPORTUNITY OF EXAMINING THE GOODS, THERE IS AN IMPLIED CONDITION THAT THE GOODS SHALL BE OF MERCHANTABLE QUALITY (2).

1. Jones v. Just, L.R. 3 Q.B. 197, 203.
Cleu v. McPherson, 1 Bosworth, 480.
Brantly v. Thomas, 22 Tex. 270, 274.
Kohl v. Lindley, 39 Ill. p. 203.
Lanz v. Wachs, 50 Ill. App. 265.

2. The intention of the parties must be taken to be that the article shall be salable in the market, under the denomination mentioned in the contract (*a*). The law implies this from the contract itself—exacting from every man common honesty in the execution of his agreements, without specially providing for it (*b*).

(*a*) Gardiner v. Gray, 4 Camp. 144.

(*b*) Gould v. Banks, 8 Wend. p. 567.

Where the contract is executory, or, in other words, to deliver an article not specifically determined at the time, on a future day, whether the seller has an article of the kind on hand, or it is afterwards to be procured or manufactured, the promisee cannot be compelled to put up with an inferior article. The contract carries with it an obligation that the article shall be at least merchantable—at least of medium quality or goodness.

Howard v. Hoey, 23 Wend. 350, 351.
Hamilton v. Ganyard, 34 Barb. 204.

Wood Mower Co. v. Thayer, 50 Hun, 516.
Brown v. Sayles, 27 Vt. 227.
Rodgers v. Niles, 11 Ohio St. 48.
Cullen v. Bimm, 37 Ohio St. 236, 240.
Babcock v. Trice, 18 Ill. 420.
Fish v. Roseberry, 22 Ill. 288.
Doane v. Dunham, 65 Ill. 512.
Weiger v. Gould, 86 Ill. 180.
Fitch v. Archibald, 29 N.J.L. 160.
Swett v. Shumway, 102 Mass. 365.
Murchie v. Cornell, 155 Mass. 60.
Fogel v. Brubaker, 122 Pa. St. 7.
Cunningham v. Hall, 1 Sprague, 404.
Ketchum v. Wells, 19 Wis. 25.
McClung v. Kelley, 21 Iowa, 508.
Bigger v. Bovard, 20 Kan. 204.
Warner v. Ice Co. 74 Me. 475.
Hood v. Bloch, 29 W. Va. 244.

An order for a machine from the manufacturer or a dealer in machines of that kind *prima facie* implies that the machine shall be new, not second hand, or the worse for wear.

Grieb v. Cole, 60 Mich. 397.

Rule 18.—(C.) WHERE GOODS ARE BOUGHT FROM THE MANUFACTURER THERE IS AN IMPLIED WARRANTY THAT THE GOODS ARE FREE FROM ANY LATENT DEFECT ARISING FROM THE PROCESS OF MANUFACTURE THAT WOULD RENDER THEM UNFIT FOR THE USUAL PURPOSE OF SUCH GOODS.

Shepherd v. Pybus, 3 M. & Gr. 868, 880.
Hoe v. Sanborn, 21 N.Y. 552.
White v. Miller, 71 N.Y. 118.
Kellogg Bridge Co. v. Hamilton, 110 U.S. 108.
Brenton v. Davis, 8 Blackf. 317.

Poland v. Miller, 95 Ind. 387.
Beers v. Williams, 16 Ill. 69.
Downing v. Dearborn, 77 Me. 457.
See also Beals v. Olmstead, 24 Vt. 114, 115.
Merriam v Field, 24 Wis. 640.
Pease v. Sabin, 38 Vt. 432.
Mann v Everston, 32 Ind. 355.
Leopold v. Van Kirk, 27 Wis. 152.
Boothby v. Scales, 27 Wis, 626, 633.
Chicago Pkg. Co. v. Tilton, 87 Ill. 547, 555.
Wis. Brick Co. v. Refrigerator Co. (Minn. 1895), 62 N.W. Rep. 550.

The general doctrine is well established that the seller of an article, manufactured by him for a particular purpose, impliedly warrants it against all such defects as arise from his unskillfulness either in selecting the materials or in putting them together and adapting them to the required purpose (*a*).

When the seller is the manufacturer of the article sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture (*b*).

(a) Bragg v. Morrill, 49 Vt. p. 46.
Fairbank Canning Co. v. Metzger, 118 N.Y. p. 267.
Rodgers v. Niles, 11 Ohio St. p. 56.
Union H. & L. Co. v. Reissig, 48 Ill. p. 76.

(b) Kellogg Bridge Co. v. Hamilton, 110 U.S. p. 116.

So also upon the sale of seeds by the grower there is an implied warranty that they are free from any latent defect arising from improper cultivation.

White v. Miller, 71 N.Y. 118, 131.

It is otherwise where the seller is not the manufacturer or grower (a). Still, under some circumstances, he may be guilty of deceit and liable on that ground (b).

(a) Parkinson v. Lee, 2 East, 314.
Eagan v. Call, 34 Pa. St. 236.
Dickinson v. Gay, 7 Allen, 29.
Hight v. Bacon, 126 Mass. 10.
Dounce v. Dow, 64 N.Y. 411.
Healy v. Brandon, 66 Hun, 515.
Misner v. Granger, 4 Gilm, 69.
Chicago Pkg. Co. v. Tilton, 87 Ill. 547.
Deming v. Foster, 42 N.H. 165.
Rocchi v. Schwabacher, 33 La. Ann. 1364, 1368.
See also Archdale v. Moore, 19 Ill. 565.
Bragg v. Morrill, 49 Vt. 45.

(b) Cornelius v. Molloy, 7 Pa. St. 293, 296.
Croyle v. Moses, 90 Pa. St. 250.
Baker v. Seahorn, 1 Swan, 54.
Nickley v. Thomas, 22 Barb. 652.
Roseman v. Canovan, 43 Cal. 110.
Stewart v. Stearns, 63 N.H. 99.
Whitworth v. Thomas, 83 Ala. 310.

Rule 18.—(D.) WHERE ARTICLES OF FOOD ARE BOUGHT FROM THE MANUFACTURER (1), OR FROM A COMMON DEALER WHO SELLS TO HIS CUSTOMERS FOR DOMESTIC USE (2), THERE IS AN IMPLIED WARRANTY THAT THEY ARE WHOLESOME (3).

1. As where bread is sold by the baker to a party for the supply of customers.

Sinclair v. Hathaway, 57 Mich. 60.

And one who prepares meat for sale as food is treated as the manufacturer.

Copas v. Provision Co. 73 Mich. 541, 547.
Fairbank Canning Co. v. Metzger, 118 N.Y. p. 268.
See also Van Bracklin v. Fonda, 12 Johns. 468.
Hoover v. Peters, 18 Mich. 51.
Burch v. Spencer, 15 Hun 504.

2. From the nature and duties of his calling it may readily be presumed that a common dealer who sells provisions to the consumer knows whether they are unwholesome or not, and that the consumer relies upon the dealer's supposed skill or judgment.

Winsor v. Lombard, 18 Pick. p. 62.
Moses v. Mead, 1 Denio, p. 387–8.
Howard v. Emerson, 110 Mass. p. 321.
See also Bigge v. Parkinson, 7 H. & N. 955.
Misner v. Granger, 4 Gilm. p. 74–5.
Zoller v. Morse, 130 Mass. 267.
Bishop v. Weber, 139 Mass. p. 417.
Craft v. Parker, 96 Mich. p. 248.
Rothmiller v. Stein, 143 N.Y. p. 592.

3. But, in the absence of an express warranty, where the seller of a specific article of food is

neither the manufacturer nor a common dealer for immediate consumption, he is not liable, if it proves unwholesome (*a*), unless he is guilty of deceit. The concealment of the fact that an animal sold for food was diseased is equivalent to the suggestion of a falsehood that it was sound (*b*).

(*a*) Burnby v. Bollett, 16 M. & W. 644.
Emmerton v. Mathews, 7 H. & N. 586.
Emerson v. Brigham, 10 Mass. 197.
Howard v. Emerson, 110 Mass. 320.
Giroux v. Stedman, 145 Mass. 439.
Moses v. Mead, 1 Denio, 378; S.C. 5 Denio, 617.
Jones v. Murray, 3 Monroe, 83.
Humphreys v. Comline, 8 Blackf. 521.
Needham v. Dial, 4 Tex. Civ. App. 141.

(*b*) Van Bracklin v. Fonda, 12 Johns. 468.
Divine v. McCormick, 50 Barb. 116.
See also Burch v. Spencer, 15 Hun, 504, 510.
French v. Vining, 102 Mass. 132, 136.

Rule 18.—(E.) AN IMPLIED WARRANTY OR CONDITION AS TO QUALITY OR FITNESS FOR A PARTICULAR PURPOSE MAY BE ANNEXED BY A KNOWN USAGE OF TRADE.

See Jones v. Bowden, 4 Taunt. 847.
Syers v. Jonas, 2 Exch. 111.
Schnitzer v. Print Works, 114 Mass. 123.

As to knowledge of the usage see r 58, n 3.

Parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary (*a*). But they are not bound by a usage inconsistent with any

stipulation of the contract; as, for instance, a usage in contravention of an express warranty (*b*), or of the warranty accompanying a sale by sample (*c*), or by the manufacturer (*d*).

(*a*) Robinson v. United States, 13 Wal. 363, 366.
Hostetter v. Park, 137 U.S. p. 40.
Hutton v. Warren, 1 M. & W. p. 475.

(*b*) Marshall v. Perry, 67 Me. 78.
Van Hoesen v. Cameron, 54 Mich. 609.

(*c*) Dickinson v. Gay, 7 Allen, 29.
Everingham v. Lord, 19 Ill. App. 565, 568.

(*d*) Whitmore v. Iron Co. 2 Allen, 52.
Chicago Pkg. Co. v. Tilton, 87 Ill. 547.

Rule 18.—(F.) AN EXPRESS WARRANTY OR CONDITION AS TO TITLE DOES NOT NEGATIVE AN IMPLIED WARRANTY OR CONDITION AS TO QUALITY OR FITNESS FOR A PARTICULAR PURPOSE; AND VICE VERSA.

Merriam v. Field, 24 Wis. 640.
Jackson v. Langston, 61 Ga. p. 394.

And the doctrine that an express provision as to quality or fitness excludes by implication an implied provision as to quality or fitness (*a*) does not affect cases in which the express provision appears, upon the true construction of the contract, to have been superadded for the benefit of the buyer (*b*). Thus a stipulation that provisions ordered for a troop ship should pass the inspection of the East India Company, was held not to exclude the implied condition of merchantableness for that purpose (*c*).

(*a*) De Witt v. Berry, 134 U.S. 306, 313.
Case Plow Works v. Niles (Wis. 1895), 63 N.W. Rep. 1013.

(*b*) Mody v. Gregson, L.R. 4 Ex. p. 53.
Drummond v. Van Ingen, 12 App. Cas. p. 294.

(*c*) Bigge v. Parkinson, 7 H. & N. 955.
See also Boothby v. Scales, 27 Wis. 626.
Wilcox v. Owens, 64 Ga. 601.
Blackmore v. Fairbanks, 79 Iowa, 282.
Bucy v. Agricultural Works (Iowa, 1893), 56 N.W Rep. 541.

Sale by Sample.

Rule 19.—A CONTRACT OF SALE IS A CONTRACT FOR SALE BY SAMPLE WHERE THERE IS A TERM IN THE CONTRACT, EXPRESS OR IMPLIED, TO THAT EFFECT.

There must be an agreement to sell by sample, or at least an understanding of the parties, that the sale is to be a sale by sample.

Waring v. Mason, 18 Wend. 425, 434.
Hargous v. Stone, 5 N.Y. 73, 85.
Ames v. Jones, 77 N.Y. 614.
The Monte Allegre, 9 Wheat. 647.
Schuchardt v. Allens, 1 Wal. 370.
Gunther v. Atwell, 19 Md. 157, 168.

That evidence of usage is admissible to show that a sale was by sample see:

Syers v. Jonas, 2 Exch. 111.
Boorman v. Jenkins, 12 Wend. 566.
Atwater v. Clancy, 107 Mass. 369.

Where the goods are present with an opportunity to examine them, the mere circumstance that the seller exhibits a sample taken from the bulk does not of itself make it a sale by sample; because the sample may be exhibited, merely to aid the buyer by way of inspection in forming an opinion of the goods, and without any mutual understanding that the seller thereby intends to give an assurance that the bulk is to be equal in quality to the sample (*a*). This is clearly so where the buyer is told to examine the goods for himself (*b*).

(*a*) Beirne v. Dord, 5 N.Y. 95, 99.
Day v. Raguet, 14 Minn. 273, 282.
Proctor v. Spratley, 78 Va. 254.
Selser v. Roberts, 105 Pa. St. 245.

(*b*) Salisbury v. Stainer, 19 Wend. 159, 161.
Barnard v. Kellogg, 10 Wal. 383, 389.
Jones v. Wasson, 3 Baxter, 211, 212.

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchants of that class at the time."

Drummond v. Van Ingen, 12 App. Cas. p. 297.

Rule 20.—IN THE CASE OF A CONTRACT FOR SALE BY SAMPLE—

(A.) THERE IS AN IMPLIED CONDITION THAT THE BULK SHALL CORRESPOND WITH THE SAMPLE IN QUALITY.

Parker v. Palmer, 4 B. & Ald. 387, 391.
Bradford v. Manly, 13 Mass. 139, 144.
Dickinson v. Gay, 7 Allen, p. 31.
Waring v. Mason, 18 Wend. 425.
Beirne v. Dord, 5 N.Y. p. 98.
Magee v. Billingsley, 3 Ala. 679.
Schuchardt v. Allens, 1 Wal. 370.
Pope v. Allis, 115 U.S. p. 372.
Hanson v. Busse, 45 Ill. 496.
Webster v. Granger, 78 Ill. 230, 233.
Dayton v. Hooglund, 39 Ohio St. 671.
Brigham v. Retelsdorf, 73 Iowa, 712.
And see Merriman v. Chapman, 32 Conn. 146.
Penn v. Smith (Ala. 1893), 12 South. Rep. 818.
Hubbard v. George, 49 Ill. 275.
Leonard v. Fowler, 44 N.Y. 289.

The fact that berries sold by sample are contained in separate bags does not necessarily imply an agreement that each bag shall be equal to the sample. Evidence is admissible to prove a custom that, upon such sale, the sample represents the average quality of the entire lot, and not the average quality of the contents of each bag taken separately.

Schnitzer v. Print Works, 114 Mass. 123.

It is held in Pennsylvania that in a contract for sale by sample there is "a guaranty only that the article to be delivered shall follow its kind, and be simply merchantable."

Boyd v. Wilson, 83 Pa. St. 319, 324.
Selser v. Roberts, 105 Pa. St. 242, 246.
Mining Co. v. Jones, 108 Pa. St. 55, 65.

Rule 20.—(B.) THERE IS AN IMPLIED CONDITION THAT THE BUYER SHALL HAVE A REASONABLE OPPORTUNITY OF COMPARING THE BULK WITH THE SAMPLE.

Lorymer v. Smith, 1 B. & C. 1.
Heilbutt v. Hickson, L.R. 7 C.P. p. 456.
Magee v. Billingsley, 3 Ala. 679, 695.
Pope v. Allis, 115 U.S. p. 372.
McNeal v. Braun, 53 N.J.L. p. 624.

Prima facie the place of delivery is the place for inspection.

Perkins v. Bell, (1893) 1 Q.B. 193.
See also r 37 (A), n.

When the goods are specifically described by the contract, they must answer to their description as well as correspond with the sample.

Nichol v. Godts, 10 Exch. 191.
Gould v. Stein, 149 Mass. 570.
See also r 16, n 2.

Rule 20.—(C.) WHERE THE SELLER IS THE MANUFACTURER, THERE IS AN IMPLIED CONDITION THAT THE GOODS SHALL BE FREE FROM ANY DEFECT ARISING FROM THE PROCESS OF MANUFACTURE AND RENDERING THEM UNMERCHANTABLE WHICH WOULD NOT BE APPARENT ON REASONABLE EXAMINATION OF THE SAMPLE.

Heilbutt v. Hickson, L.R. 7 C.P. 438.
Mody v. Gregson, L.R. 4 Ex. 49.
Drummond v. Van Ingen, 12 App. Cas. 284.
Jones v. Padgett, 24 Q.B.D. 650.
Hoe v. Sanborn, 21 N.Y. 552, 562.

Where the bulk corresponds with the sample, if the seller is not the manufacturer or grower, he is not liable for a latent defect in the goods, in the absence of a stipulation to that effect, unless he is guilty of fraud.

Parkinson v. Lee, 2 East, 314.
Dickinson v. Gay, 7 Allen, 29.
Hight v. Bacon, 126 Mass. 12, 13.
And see Barnard v. Kellogg, 10 Wal. 383, 391.
Jones v. Wasson, 3 Baxter, 211, 212.

CHAPTER III.

EFFECTS OF THE CONTRACT.

Transfer of Property as Between Seller and Buyer.

Rule 21.—WHERE THERE IS A CONTRACT FOR THE SALE OF UNASCERTAINED GOODS THE PROPERTY IN THE GOODS IS NOT TRANSFERRED TO THE BUYER UNLESS AND UNTIL THE GOODS ARE ASCERTAINED (1).

QUALIFICATION: ON A CONTRACT FOR THE SALE OF A CERTAIN QUANTITY OF A LARGER MASS OF ASCERTAINED GOODS UNIFORM IN KIND AND QUALITY (2), THE PROPERTY WILL PASS, THOUGH THERE BE NO SEPARATION OF THE QUANTITY SOLD, IF SUCH BE THE CLEAR INTENTION OF THE PARTIES (3).

1. In the case of a contract for the sale of a certain quantity of goods by a general descrip-

tion, the buyer's right arising out of the contract is not, and until the goods sold are specifically ascertained, cannot become a right of property in any goods; nor can there be in such contract any intention that the property in any goods shall be immediately transferred from the seller to the buyer. The seller would fulfill his part of the contract by furnishing that quantity of any goods answering the description.

Heilbutt v. Hickson, L.R. 7 C.P. 438, 449.
Rapelye v. Mackie, 6 Cow. 250, 252.
Joyce v. Adams, 8 N.Y. 291, 297.
Cornell v. Clark, 104 N.Y. 451, 457.
Low v. Freeman, 12 Ill. 467, 469.
Ill. Cent. R.R. Co. v. Cassell, 17 Ill. 389.
Home Ins. Co. v. Heck, 65 Ill. 111.
Golder v. Ogden, 15 Pa. St. 528.
McCandlish v. Newman, 22 Pa. St. 460.
Haldeman v. Duncan, 51 Pa. St. 66, 70.
Gardner v. Lane, 9 Allen, 492, 498.
Ormsbee v. Machir, 20 Ohio St. 295.
Hubler v. Gaston, 9 Oregon, 66, 70.
Davis v. Budd, 60 Iowa, 144.
Schreyer v. Lumber Co. 13 U.S. App. 23, 28.

The principle applies to a contract for the sale of goods to be manufactured.

Mucklow v. Mangles, 1 Taunt, 318.
Tripp v. Armitage, 4 M. & W. 687.
Seath v. Moore, 11 App. Cas. 350, 381.
Bellamy v. Davey, (1891) 3 Ch. 540.
Merritt v. Johnson, 7 Johns, 473.
Johnson v. Hunt, 11 Wend. 135.
McConihe v. R.R. Co. 20 N.Y. 495.
Wilkins v. Holmes, 5 Cush. 147.
Updike v. Henry, 14 Ill. 378.
Schneider v. Westerman, 25 Ill. 514.
West Jersey R.R. Co. v. Car Works Co. 32 N.J.L. 517
First Nat. Bank v. Crowley, 24 Mich. 492, 497.

Shaw v. Smith, 48 Conn. 306.
Tufts v. Lawrence, 77 Tex. 526.
White Bronze Co. v. Gillette, 88 Mich. 231.

"In general, a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party."

Andrews vs. Durant, 11 N.Y. 35 at p. 40.
Hall v. Green, 1 Houston, 546.
Briggs v. A Light House, 7 Allen, 287, 292.
Wright v. Tetlow, 99 Mass. 397, 404.
Derbyshire's Estate, 81 Pa. St. 18, 22.
Stevens v. Shippen, 29 N.J. Eq. 602, 605.
Clarkson v. Stevens, 106 U.S. 505, 513.
Bacon v. The Poconoket, 67 Fed. 262.
And see Seath v. Moore, 11 App. Cas. 350, 370.
Wollensak v. Briggs, 119 Ill. 453, 465.

And where there is a contract for the sale of a certain quantity of ascertained goods in bulk and anything remains to be done between the parties to individualize and identify the particular part intended to be sold, such as counting, weighing, measuring or the like, the sale is *prima facie* not complete until such part is separated from the bulk.

Ockington v. Richey, 41 N.H. 275.
Morrison v. Dingley, 63 Me. 553.
Reeder v. Machen, 57 Md. 56.
Block v. Maas, 65 Ala. 211.
Warten v. Strane, 82 Ala. 311.
Dunlap v. Berry, 4 Scam. 327.

2. The property in the goods does not pass at once where the goods composing the mass are of

different kinds or qualities, making not merely separation but selection necessary.

Hutchinson v. Hunter, 7 Pa. St. 140.
McLaughlin v. Piatti, 27 Cal. 451.
Stephens v. Santee, 49 N.Y. 35.
Foot v. Marsh, 51 N.Y. 288.
Smart v. Batchelder, 57 N.H. 140.
Hahn v. Fredericks, 30 Mich. 223.
Hoffman v. King, 58 Wis. 314.
Anderson v. Crisp, 5 Wash. 178.

3. It is competent for the parties to make themselves tenants in common of the goods in bulk by the sale of a part.

Kimberly v. Patchin, 19 N.Y. 330.
Russell v. Carrington, 42 N.Y. 118.
Chapman v. Shepard, 39 Conn. 413.
Hurff v. Hires, 40 N.J.L. 581.
Kingman v. Holmquist, 36 Kan. 735.
Nash v. Brewster, 39 Minn. 530.
Mackellar v. Pillsbury, 48 Minn. 396.
Brownfield v. Johnson, 128 Pa. St. 267.
Cloke v. Shafroth, 137 Ill. p. 399.

This qualification as to the sale of a certain quantity of a larger mass of ascertained goods uniform in kind and quality is not recognized in some of the states.

Scudder v. Worster, 11 Cush. 573.
Ferguson v. Bank, 14 Bush, 555.
Commercial Bank v. Gillette, 90 Ind. 268.

A mutual intention that the property shall pass immediately will be inferred where the buyer is allowed to take possession of the goods for the purpose of enabling him to separate the part sold (*a*), or where the goods are in the custody of

a third person and the seller gives an order on him for the part sold which is accepted (*b*).

(*a*) Weld v. Cutler, 2 Gray, 195, 197.
Lamprey v. Sargent, 58 N.H. 241.
Iron Cliffs Co. v. Buhl, 42 Mich. 86.
Wells v. Littlefield, 59 Tex. 556.

(*b*) Whitehouse v. Frost, 12 East, 614.
Cushing v. Breed, 14 Allen, 376.
Hall v. R.R. Co. 14 Allen, 439.
Keeler v. Goodwin, 111 Mass. p. 491.
Farnum v. Pitcher, 151 Mass. p. 475.
Newhall v. Langdon, 39 Ohio St. 87.
Carpenter v. Graham, 42 Mich. 191.
Horr v. Barker, 8 Cal. 603; S.C. 11 Cal. 393.
Hutchison v. Commonwealth, 82 Pa. St. 472.
Morrison v. Woodley, 84 Ill. 192.

Rule 22.—(A.) WHERE THERE IS A CONTRACT FOR THE SALE OF SPECIFIC OR ASCERTAINED GOODS THE PROPERTY IN THEM IS TRANSFERRED TO THE BUYER AT SUCH TIME AS THE PARTIES TO THE CONTRACT INTEND IT TO BE TRANSFERRED.

Turley v. Bates, 2 H. & C. 200, 211.
Young v. Matthews, L.R. 2 C.P. 127, 129.
Riddle v. Varnum, 20 Pick. 280, 283.
Sherwin v. Mudge, 127 Mass. 547, 549.
Decker v. Furniss, 14 N.Y. 615, 619.
Terry v. Wheeler, 25 N.Y. 520, 525.
Boswell v. Green, 25 N.J.L. 390, 398.
Graff v. Fitch, 58 Ill. 373, 377.
Foster v. Magill, 119 Ill. 75, 81.
Whitcomb v. Whitney, 24 Mich. 486, 490.
Hatch v. Oil Co. 100 U.S. 124, 131.
Gonser v. Smith, 115 Pa. St. 452, 460.
Kost v. Reilly, 62 Conn. 57, 60.

The intention of the parties is the governing consideration in every case. The law gives effect to the contract according to the intention of the parties.

Rule 22.—(B.) FOR THE PURPOSE OF ASCERTAINING THE INTENTION OF THE PARTIES REGARD MUST BE HAD TO THE TERMS OF THE CONTRACT, THE CONDUCT OF THE PARTIES, AND THE CIRCUMSTANCES OF THE CASE.

Foster v. Ropes, 111 Mass. 10, 16.
Lingham v. Eggleston, 27 Mich. 324, 326.
Winslow v. Leonard, 24 Pa. St. 14, 17.
Callaghan v. Myers, 89 Ill. 566, 570.
Vehmeyer v. Earl, 22 Ill. App. 522.
Cornell v. Clark, 104 N.Y. 451, 455.
Kost v. Reilly, 62 Conn. 57, 60.
Merchants' Bank v. McGraw, 15 U.S. App. 332, 338.

Rule 23.—UNLESS A DIFFERENT INTENTION APPEARS (1), THE FOLLOWING ARE RULES FOR ASCERTAINING THE INTENTION OF THE PARTIES AS TO THE TIME AT WHICH THE PROPERTY IN THE GOODS IS TO PASS TO THE BUYER:

(SUB-RULE 1.) WHERE THERE IS AN UNCONDITIONAL CONTRACT FOR THE SALE OF SPECIFIC GOODS, IN A DELIVERABLE STATE (2), THE PROPERTY IN THE GOODS PASSES TO THE BUYER WHEN THE CONTRACT IS MADE, AND IT IS IMMATERIAL WHETHER THE TIME OF PAYMENT OR THE TIME OF DELIVERY, OR BOTH, BE POSTPONED (3).

1. See Decker v. Furniss, 14 N.Y. 611, 615.
Sherwin v. Mudge, 127 Mass. 547, 549.
Brock v. O'Donnell, 45 N.J.L. 441, 443.
Kost v. Reilly, 62 Conn. 57.

2. Goods are in a "deliverable state" within the meaning of this work when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

3. Tarling v. Baxter, 6 B. & C. 360.
Olyphant v. Baker, 5 Denio, 379, 382.
Van Brocklen v. Smeallie, 140 N.Y. 72.
Bowen v. Burk, 13 Pa. St. 146, 148.
Boyle v. Rankin, 22 Pa. St. 168.
Janney v. Howard, 150 Pa. St. p. 344.
Wade v. Moffett, 21 Ill. 110, 111.
Barrow v. Window, 71 Ill. 214, 217.
Leonard v. Davis, 1 Black, 476, 483.
Arkansas Cattle Co. v. Mann, 130 U.S. 69.
Morse v. Sherman, 106 Mass. 430, 433.
Folsom v. Cornell, 150 Mass. 115, 119.
Bertelsen v. Bower, 81 Ind. 514.
Pilgreen v. State, 71 Ala. 370.
Montgomery Furniture Co. v. Hardaway (Ala. 1894), 16 South. Rep. 29.

It is well settled at the common law that by a contract for the sale of specific or ascertained goods the property immediately vests in the buyer, and a right to the price in the seller, unless it appears that such was not the intention of the parties (*a*).

Where, by the contract itself, the seller appropriates to the buyer specific goods and the latter thereby agrees to take the same, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The

very appropriation of the goods is equivalent to delivery by the seller, and the assent of the buyer to take the specific goods and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the buyer (*b*).

The owner may pass the title to an absent or a present thing without delivery; for, as between seller and buyer, it is specification and not delivery that is necessary to the vesting of the title (*c*).

(*a*) Gilmour v. Supple, 11 Moore, P.C. p. 556.
Hatch v. Oil Co. 100 U.S. p. 134.
Briggs v. United States, 143 U.S. p. 355.

(*b*) Dixon v. Yates, 5 B. & Ad. p. 340.
Goddard v. Binney, 115 Mass. p. 455.
Hatch v. Oil Co. 100 U.S. p. 132.

(*c*) Winslow v. Leonard, 24 Pa. St. p. 17.

It has been held in several cases that the owner of goods which are in the known and exclusive adverse possession of another who claims the absolute title thereto, cannot transfer the legal property therein, so as to enable the buyer to maintain, in his own name, an action against the adverse claimant. In those cases it is claimed that it is against the policy of the common law to allow a party to buy a lawsuit and litigate a question in dispute between his grantor and the adverse claimant (*a*).

It should be noticed that the rule thus applied does not reach the case where goods are held by a mere wrongdoer not claiming title (*b*), nor the case of a bailee or lien holder whose claim is subordinate to and by virtue of the general property and right of the acknowledged owner (*c*).

(*a*) O'Keefe v. Kellogg, 15 Ill. 347, 352.
M'Goon v. Ankeny, 11 Ill. 558, 560.
Bowers v. Bodley, 4 Ill. App. 279, 281.
Erickson v. Lyon, 26 Ill. App. 17, 22.
Young v. Ferguson, 1 Litt. (Ky.) 298, 299.
Stogdell v. Fugate, 2 A.K. Marsh, 136.
Stedman v. Riddick, 4 Hawks, (N. Car.) 29, 33.
Gardner v. Adams, 12 Wend. 297, 299.
Goodwyn v. Lloyd, 8 Porter, (Ala.) 237, 242.
Dunklin v. Wilkins, 5 Ala. 199, 201.
Overton v. Williston, 31 Pa. St. 155, 160.

(*b*) See Tome v. Dubois, 6 Wal. 548, 554, 555.
Carpenter v. Hale, 8 Gray, 157, 158.

(*c*) Hughes v. Stubblefield, 21 Ill. App. 216, 217.
Beach v. Derby, 19 Ill. 616, 622.

Rule 23.—(SUB-RULE 2.) WHERE THERE IS A CONTRACT FOR THE SALE OF SPECIFIC GOODS AND THE SELLER IS BOUND TO DO SOMETHING TO THE GOODS, FOR THE PURPOSE OF PUTTING THEM INTO A DELIVERABLE STATE, THE PROPERTY DOES NOT PASS UNTIL SUCH THING BE DONE.

Rugg v. Minett, 11 East, 210.
Acraman v. Morrice, 8 C.B. 449.
Anderson v. Morice, L.R. 10 C.P. 609, 618; S.C. 1 App. Cas. 713.
Hale v. Huntley, 21 Vt. 147.
Foster v. Ropes, 111 Mass. 10, 15.
Elgee Cotton Cases, 22 Wal. 180, 193.
Malone v. Stone Co. 36 Minn. 325, 327.
Wollensak v. Briggs, 119 Ill. 453, 466.

As where a specified lot of fish was to be put on flakes and dried and weighed by the seller before delivery.

Foster v. Ropes, 110 Mass. 10.

The seller, however, may engage to do something in respect of the goods which the parties do not mean to be essential before the property passes.

Thus, an engagement on the seller's part to take the goods to a certain place (*a*), or to repair them (*b*), may under some circumstances be properly regarded as an undertaking to render the service in the character of bailee, after the transfer of ownership by mutual assent.

So, a person may buy goods in an unfinished condition and acquire the right of property in them though the possession be retained by the seller in order that he may complete them, if the intention to that effect is fully proved (*c*).

(*a*) Smith v. Sparkman, 55 Miss. p. 652.
Terry v. Wheeler, 25 N.Y. 520, 525.
Weld v. Came, 98 Mass. 152, 154.
Bethel Mill Co. v. Brown, 57 Me. 9, 18.
Dyer v. Libby, 61 Me. 45, 48.
Bertelson v. Bower, 81 Ind. 512, 514.
Rail v. Lumber Co. 47 Minn. 422, 425.

(*b*) Beecher v. Mayall, 16 Gray, 376.
Marble v. Moore, 102 Mass. 443.

(*c*) Butterworth v. McKinly, 11 Humph. 206.
Hatch v. Oil Co. 100 U.S. p. 136.
Young v. Matthews, L.R. 2 C.P. 127.
See also Mount Hope Iron Co. v. Buffinton, 103 Mass 62, 64.
Graff v Fitch, 58 Ill. 373, 377.
Hurd v. Cook, 75 N.Y. 454, 458.

Rule 23.—(SUB-RULE 3.) WHERE THERE IS A CONTRACT FOR THE SALE OF SPECIFIC GOODS IN A DELIVERABLE STATE, BUT THE SELLER IS BOUND TO WEIGH, MEASURE, TEST, OR DO SOME OTHER ACT OR THING WITH REFERENCE TO THE GOODS FOR THE PURPOSE OF ASCERTAINING THE PRICE, THE PROPERTY DOES NOT PASS UNTIL SUCH ACT OR THING BE DONE.

Turley v. Bates, 2 H. & C. p. 210.
Hanson v. Meyer, 6 East, 614.
Lingham v. Eggleston, 27 Mich. 324.
Kein v. Tupper, 52 N.Y. 550, 553.
Nesbit v. Burry, 25 Pa. St. 208.
Nicholson v. Taylor, 31 Pa. St. 128.
Frost v. Woodruff, 54 Ill. 155.

It is otherwise where nothing remains to be done by the seller, and it appears that the parties intended that the property in the goods should pass immediately (*a*); as where all of a certain lot of hay in a rick or barn is sold at an agreed price per ton, the same to be baled and weighed by the buyer (*b*).

(*a*) Tansley v. Turner, 2 Bing. N.C. 151.
Turley v. Bates, 2 H. & C. 200.
Leonard v. Davis, 1 Black, 476, 483.
Bradley v. Wheeler, 44 N.Y. 495.
Groat v. Gile, 51 N.Y. 431, 436.
Sanger v. Waterbury, 116 N.Y. 371.
Seckel v. Scott, 66 Ill. 106, 109.
Luthy v. Waterbury, 140 Ill. 664.

(*b*) Kohl v. Lindley, 39 Ill. 195, 199.
Phillips v. Moor, 71 Me. 78, 81.

Where the goods are delivered to the buyer the presumption is that the parties intended that the

property in them should pass at once though they are to be weighed or measured in order to ascertain the total amount of the price.

Macomber v. Parker, 13 Pick. 175, 182.
Riddle v. Varnum, 20 Pick. 280, 284.
Odell v. Railroad, 109 Mass. 50, 52.
Scott v. Wells, 6 W. & S. 357.
Diehl v. McCormick, 143 Pa. St. 584, 593.
Crofoot v. Bennett, 2 N.Y. 258, 260.
Burrows v. Whitaker, 71 N.Y. 291, 296.
Cunningham v. Ashbrook, 20 Mo. 553, 558.
Boswell v. Green, 25 N.J.L. 390, 397.
Haxall v. Willis, 15 Grattan, 434, 440.
Kelsea v. Haines, 41 N.H. 246, 252.
Bell v. Farrar, 41 Ill. 400.
Graff v. Fitch, 58 Ill. 373.
Shelton v. Franklin, 68 Ill. 333.
Straus v. Minzesheimer, 78 Ill. 492.
Hatch v. Oil Co. 100 U.S. 135.
Adams Mining Co. v. Senter, 26 Mich. 73, 79.
Van Wert v. Grocer Co. (Mich. 1894), 59 N.W. Rep 139.
King v. Jarman, 35 Ark. 190, 197.
Sedgwick v. Cottingham, 54 Iowa, 512, 515.
Upson v. Holmes, 51 Conn. 500, 502.
Gill v. Benjamin, 64 Wis. 362, 367.
Baldwin v. Doubleday, 59 Vt. 7.
Farmers' Phosphate Co. v. Gill, 69 Md. 537, 545.
Barr v. Borthwick, 19 Oregon, 578.

The most important fact indicative of an intent that the property shall pass is generally that of delivery. If the goods are delivered to the buyer it is very strong evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, or some other act, is to be done afterwards (*a*).

But the question is one of mutual assent; whether the minds of the parties have met, and

by their understanding the buyer has become owner. While delivery is usually the most sig nificant fact to show the transfer of property it is not conclusive, for there may be an understanding to the contrary (*b*); as where the delivery is for the purpose of inspection and selection by the buyer (*c*).

(*a*) Lingham v. Eggleston, 27 Mich. p. 328.
Bell v. Farrar, 41 Ill. 400, 404.
Shealy v. Edwards, 73 Ala. 175.

(*b*) Wilkinson v. Holiday, 33 Mich. 386, 388.
Ballantyne v. Appleton, 82 Me. 570, 573.

(*c*) Cornell v. Clark, 104 N.Y. 451, 456.
Home Ins. Co. v. Heck, 65 Ill. 111, 117.
Rosenthal v. Kahn, 19 Oregon, 571.

Rule 23.—(SUB-RULE 4.) WHEN GOODS ARE DELIV ERED TO THE BUYER ON A CONTRACT OF "SALE OR RETURN" (1), THE PROPERTY THEREIN PASSES IMMEDIATELY TO THE BUYER, DEFEASIBLE BY A RETURN OF THE GOODS WITHIN THE TIME FIXED FOR THEIR RETURN, OR, IF NO TIME HAS BEEN FIXED WITHIN A REASONABLE TIME (2).

1. That is to say, sale to the one to whom they are delivered or return.

2. Hotchkiss v. Higgins, 52 Conn. 205, 211.
Moss v. Sweet, 16 Q.B. 493.
Jameson v. Gregory, 4 Met. (Ky.) 363.
Marsh v. Wickham, 14 Johns, 167.
Buswell v. Bicknell, 17 Me. 344.
Ray v. Thompson, 12 Cush. 281.
Martin v. Adams, 104 Mass. 262.

McKinney v. Bradlee, 117 Mass. 321.
Schlesinger v. Stratton, 9 R.I. 578.
Robinson v. Fairbanks, 81 Ala. 132.
Hadfield v. Berry, 28 Ill. App. 376.
House v. Beak, 141 Ill. 290, 301.

The American authorities treat the contract of "sale or return" as a present sale with option to return unless a different intention appears.

See Crocker v. Gullifer, 44 Me. pp. 493, 494.
Sturm v. Boker, 150 U.S. p. 328.

There is a manifest distinction between an optional right in the party receiving the goods to purchase, and an optional right to return the same goods in whole or in part. An option to purchase if satisfied is a condition precedent; an option to return if not satisfied is a condition subsequent. In one case the property in the goods will not pass until the option is determined; in the other it passes immediately subject to the option to rescind the sale by a return of the goods.

Hotchkiss v. Higgins, 52 Conn. p. 210.
Hunt v. Wyman, 100 Mass. p. 200.
Colton v. Wise, 7 Ill. App. p. 397.
Hickman v. Shimp, 109 Pa. St. p. 19.
Foley v. Felrath, 98 Ala. p. 180.
Wind v. Iler (Iowa), 61 N.W. Rep. p. 1002.

The contract of "sale or return" (in the sense of present sale with option to return), is to be distinguished from a consignment of goods for sale to customers generally, where the property in each article in the meantime remains in the consignor, whether, under the facts of the particular case, the consignee is regarded as an agent (*a*) or

as a purchaser if and when he sells it to a customer (*b*).

(*a*) Eldridge v. Benson, 7 Cush. 483.
Audenried v. Betteley, 8 Allen, 302.
Walker v. Butterick, 105 Mass. 237.
Burton v. Goodspeed, 69 Ill. 237.
Rosencranz v. Hanchett, 30 Ill. App. 283.
First Nat. Bank v. Schween, 127 Ill. 573.
Lenz v. Harrison, 148 Ill. 598.
Middleton v. Stone, 111 Pa. St. 589.
Brown v. Billington, 163 Pa. St. 76.
Monjo v. French, 163 Pa. St. 107.
Commercial Bank v. Heilbronner, 108 N.Y. 439.
Sturm v. Boker, 150 U.S. 312.
Union etc. Co. v. Cattle Co. 59 Fed. 49.
Ex parte Bright, 10 Ch. D. 566.

(*b*) Ex parte White, L.R. 6 Ch. App. 397.
Nutter v. Wheeler, 2 Lowell, 346.
In re Linforth, 4 Sawyer, 370.
Aetna Powder Co. v. Hildebrand, 137 Ind. 462.

Rule 23.—(Sub-Rule 5.) WHEN GOODS ARE DELIVERED TO THE BUYER ON APPROVAL OR OTHER SIMILAR TERMS, THE PROPERTY THEREIN PASSES TO THE BUYER:

(A.) WHEN HE SIGNIFIES HIS APPROVAL OR ACCEPTANCE TO THE SELLER (1), OR DOES ANY OTHER ACT ADOPTING THE TRANSACTION (2).

(B.) IF HE DOES NOT SIGNIFY HIS APPROVAL OR ACCEPTANCE TO THE SELLER, BUT RETAINS THE GOODS WITHOUT GIVING NOTICE OF REJECTION (3), THEN, IF A TIME HAS BEEN FIXED FOR THE REJECTION OF THE GOODS, ON THE EXPIRATION OF SUCH TIME (4), AND, IF NO TIME HAS BEEN FIXED, ON THE EXPIRATION OF A REASONABLE TIME (5).

1. Ellis v. Mortimer, 1 B. & P. (N.R.) 257.
Elphick v. Barnes, 5 C.P.D. 321.
Wilson v. Stratton, 47 Me. 120, 126.
Chamberlain v. Smith, 44 Pa. St. 431.
Mowbray v. Cady, 40 Iowa, 604.
Stone v. Browning, 68 N.Y. 598.
Pitt's Sons v. Poor, 7 Ill. App. 24, 27.

2. As selling the goods to a third person (*a*), or refusing to surrender them on rightful demand (*b*).

(*a*) Delamater v. Chappell, 48 Md. 244, 253.
Hickman v. Shimp, 109 Pa. St. 16, 20.

(*b*) Jones v. Wright, 71 Ill. 61.

3. Notice of rejection is sufficient without a return of the goods in the absence of an express agreement to that effect (*a*).

And such notice may be dispensed with or waived by the seller (*b*).

(*a*) McCormick Co. v. Chesrown, 33 Minn. 32.
Rohn v. Dennis, 109 Pa. St. 504.
McCormick Co. v. Cochran, 64 Mich. 636, 640.
Exhaust Ventilator Co. v. Ry. Co. 69 Wis. 454.
See also r 39.

(*b*) Wartman v. Breed, 117 Mass. p. 22.
Gibson v. Vail, 53 Vt. 476.
And see Low v. Pardee, 48 Ill. 466.
Padden v. Marsh, 34 Iowa, 522.
Sycamore Co. v. Grundrad, 16 Neb. 529.

4. Dewey v. Erie Borough, 14 Pa. St. 213.
Stutz v. Coal Co. 131 Pa. St. 267.
Butler v. School District, 149 Pa. St. 351.
Prairie Farmer Co. v. Taylor, 69 Ill. 440.
Waters Heater Co. v. Mansfield, 48 Vt. 378.
Gentilli v. Starace, 133 N.Y. 140.
Columbia Rolling Co. v. Machine Co. 55 N.J.L. 391.

5. Nichols v. Guibor, 20 Ill. 285.
Osborn v. Stanley, 35 Ill. 102.

Cook v. Tavener, 41 Ill. App. 642.
Spickler v. Marsh Bros. 36 Md. 222.
Hickman v. Shimp, 109 Pa. St. 16.
Rohn v. Dennis, 109 Pa. St. 505.
Childs v. O'Donnell, 84 Mich. 538.

In the meantime the goods remain at the risk of the seller.

Hunt v. Wyman, 100 Mass. 198.
Elphick v. Barnes, 5 C.P.D. 321.
Carter v. Wallace, 35 Hun, 189.
Pierce v. Cooley, 56 Mich. 552.
And see Head v. Tattersall, L.R. 7 Ex. 7.
Chapman v. Withers, 20 Q.B.D. 824.

An article may be manufactured or delivered on a contract with a stipulation that the article is to be "satisfactory" to the buyer. In such case, if the buyer, acting in good faith, be *really* (*a*) dissatisfied with the article, he may reject it, although he ought to be satisfied with it (*b*). Still, in a doubtful case, especially when the thing furnished is so attached to the real property of the buyer that its value will be lost to the seller, either wholly or in great part, unless paid for, the court will be inclined to construe a stipulation of this kind as a stipulation to furnish such a thing as reasonably ought to satisfy the buyer (*c*).

And keeping and using an article beyond a reasonable time without giving notice of dissatisfaction may be treated as an election to retain the article (*d*).

(*a*) Andrews v. Belfield, 2 C.B.N.S. 779.
Singerly v. Thayer, 108 Pa. St. 291, 298.
Seeley v. Welles, 120 Pa. St. 69.
School Furniture Co. v. Warsaw, 130 Pa. St. 76.
McClure v. Briggs, 58 Vt. 82.

Exhaust Ventilator Co. v. Ry. Co. 66 Wis. 218.
Silsby Mfg. Co. v. Chico, 24 Fed. 893.

(*b*) McCarren v. McNulty, 7 Gray, 139.
Brown v. Foster, 113 Mass. 136.
Goodrich v. Van Nortwick, 43 Ill. 445.
Zaleski v. Clark, 44 Conn. 218.
Gray v. Central R.R. Co. 11 Hun, 70.
Gibson v. Cranage, 39 Mich. 49.
Wood Reaping etc. Co. v. Smith, 50 Mich. 565.
Platt v. Broderick, 70 Mich. 577.
Howard v. Smedley, 140 Pa. St. 81.
Boiler Works v. Schnader, 155 Pa. St. 394.
Osborne v. Francis, 38 W. Va. 312.

(*c*) Hawkins v. Graham, 149 Mass. 284, 287.
Duplex Boiler Co. v. Garden, 101 N.Y. 387.
Doll v. Noble, 116 N.Y. 230.

(*d*) Quinn v. Stout, 31 Mo. 160.
Campbell Press Co. v. Thorp, 36 Fed. 414, 418.
Frederick v. Case, 28 Ill. App. 215.
Rosenfield v. Swenson, 45 Minn. 190.
Palmer v. Banfield, 86 Wis. 441.

Where the article is to be approved by, or satisfactory to, some third person, it is an implied condition that such third person shall act with entire good faith to both of the contracting parties. Both parties have the right to insist upon such good faith, and the want of it will dispense with the condition requiring the approval (*a*). But no mere error or mistake of judgment will vitiate his determination. The very object of his appointment is to prevent and exclude contention and litigation. "In the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive"(*b*).

(*a*) Balt. & O. R. R. Co. v. Brydon, 65 Md. 198, 227.
Lynn v. R. R. Co. 60 Md. 404, 412.

Badger v. Kerber, 61 Ill. 328, 330.
And see Fowler v. Deakman, 84 Ill. 130, 132.
County of Cook v. Harms, 108 Ill. 151, 161.
Arnold v. Bournique, 144 Ill. 132, 137.

(*b*) Mart. & P. R. R. Co. v. March, 114 U.S. 549, 551.
Sweeney v. United States, 109 U.S. 618, 620.
See also Sharpe v. Ry. Co L.R. 8 Ch. App. 597.
McAuley v. Carter, 22 Ill. 53, 58.
Taylor v. Renn, 79 Ill. 181, 184.
Snell v. Brown, 71 Ill. 133, 142.
Flint v. Gibson, 106 Mass. 391.
Robbins v. Clark, 129 Mass. 145.
Nofsinger v. Ring, 71 Mo. 149.

Rule 23.—(SUB-RULE 6 A.) WHERE THERE IS A CONTRACT FOR THE SALE OF UNASCERTAINED OR FUTURE GOODS BY DESCRIPTION, AND GOODS OF THAT DESCRIPTION AND IN A DELIVERABLE STATE ARE UNCONDITIONALLY APPROPRIATED TO THE CONTRACT, EITHER BY THE SELLER WITH THE ASSENT OF THE BUYER, OR BY THE BUYER WITH THE ASSENT OF THE SELLER, THE PROPERTY IN THE GOODS THEREUPON PASSES TO THE BUYER (1). SUCH ASSENT MAY BE EXPRESS OR IMPLIED (2), AND MAY BE GIVEN EITHER BEFORE OR AFTER THE APPROPRIATION IS MADE (3).

1. Until the specific goods upon which the contract is to operate are agreed upon the contract is not a sale, but an agreement to sell goods of a particular description. If the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific

goods to the contract is made with the assent of both parties (*a*).

But where certain goods have been selected and appropriated by the seller and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain (*b*).

(*a*) Andrews v. Cheney, 62 N.H. 404, 405.

(*b*) Heilbutt v. Hickson, L.R. 7 C.P. p. 449.

For the want of the buyer's assent it has been held that the property did not pass where the agreement was for the sale of goods by sample, although goods conforming to the sample were set apart by the seller for the buyer (*a*); where the agreement was for hops to be produced by cultivation and to be of a specified character, and such hops were tendered but not accepted (*b*); where the agreement was for articles to be manufactured, and the articles when finished were refused (*c*). Until such assent it is in the power of the seller to comply with his part of the contract by furnishing any goods answering the stipulated description, and the buyer is entitled to examine them and use his judgment in determining whether they are of such description, although if he wrongfully refuse to accept them he will be liable for damages in an action for breach of the contract (*d*).

(*a*) Andrews v. Cheney, 62 N.H. 404.
Jenner v. Smith, L.R. 4 C.P. 270.

(*b*) Rider v. Kelley, 32 Vt. 268.

(*c*) Atkinson v. Bell, 8 B. & C. 277.
Moody v. Brown, 34 Me. 107.
Tufts v. Grewer, 83 Me. 407.
Updike v. Henry, 14 Ill. 378.

(*d*) As to the measure of damages where special articles have been manufactured for particular use according to the specific directions of the buyer see:

Allen v. Jarvis, 20 Conn. 38.
Ballentine v. Robinson, 46 Pa. St. 177.
Gordon v. Norris, 49 N.H. 376.
Shawhan v. Van Nest, 25 Ohio St. 490.
Smith Bros. v. Wheeler, 7 Oregon, 49.
Black River Lumber Co. v. Warner, 93 Mo. 374.

2. Assent was implied where the buyer upon being notified of the appropriation by the seller promised to take the goods away (*a*); promised to pay for them (*b*); requested the seller to keep the goods for him awhile (*c*); requested him to sell them (*d*); left the goods with the seller without making any objection to them (*e*). If the buyer thinks proper to assent to the appropriation without seeing the goods the assent is not the less complete.

(*a*) Rohde v. Thwaites, 6 B. & C. 388, 393.

(*b*) Goddard v. Binney, 115 Mass. 450, 456.

(*c*) Wilkins v. Bromhead, 6 M. & Gr. 963, 974.
Spicers v. Harvey, 9 R.I. 582.
Armstrong v. Turner, 49 Md. 589.

(*d*) Ballentine v. Robinson, 46 Pa. St. 179, 180.

(*e*) McIntyre v. Kline, 30 Miss. 361, 367.

3. The assent may be given by means of a previous authority by the one party to the other

to make the appropriation. Such an authority is presumed when, by the terms of the contract, the seller is to do some act with reference to the goods which cannot be done until they are appropriated to the contract, as where the buyer is to send his sacks or bottles to be filled by the seller (*a*), or where the seller is to deliver the goods at a certain place for the buyer (*b*); or is to ship the goods by a carrier to the buyer at a distance (*c*). The sacks or bottles cannot be filled nor can delivery at the place or the shipment be made until the goods are specified; and the act of filling or delivering or shipping would be an overt dealing with the goods as those to which the contract applies, if the goods answer the requirements of the contract (*d*).

(*a*) Aldridge v. Johnson, 7 E. & B. 885.
Langton v. Higgins, 4 H. & N. 402.
Hatch v. Oil Co. 100 U.S. p. 136.

(*b*) Hunt v. Martin, 15 Vt. 336.
Barton v. McKelway, 22 N.J.L. 165.
Fry v. Lucas, 29 Pa. St. 356.
Nichols v. Morse, 100 Mass, 523.
Rodman v. Guilford, 112 Mass. 405.
Pacific Iron Works v. R.R. Co. 62 N.Y. 272.
Hatch v. Oil Co. 100 U.S. 124.
Nat. Bank v. Dayton, 102 U.S. 59, 61.
Sedgwick v. Cottingham, 54 Iowa, 512.
Pratt v. Peck, 70 Wis. 624.
Bloyd v. Pollocks, 27 W. Va. 75, 128.
White v. Harvey, 85 Me. 212.
Fredette v. Thomas (Minn. 1894), 58 N.W. Rep. 984.

(c) Smith v. Edwards, 156 Mass. 221.
Ex parte Pearson, L.R. 3 Ch. App. 443.
Ellis v. Roche, 73 Ill. 280.
Schmertz v. Dwyer, 53 Pa. St. 335.
Higgins v. Murray, 73 N.Y. 252.

Mee v. McNider, 109 N.Y. 500.
Kelsea v. Mfg. Co. 55 N.J.L. 320.

(*d*) Smith v. Edwards, 156 Mass. p. 223.
Fogel v. Brubaker, 122 Pa. St. 7, 15.
Pierson v. Crooks, 115 N.Y. 539, 549.
Pope v. Allis, 115 U.S. 363, 372.

Rule 23.—(SUB-RULE 6 B.) WHERE, IN PURSUANCE OF THE CONTRACT, OR THE BUYER'S DIRECTION, THE SELLER DELIVERS THE GOODS TO THE BUYER OR TO A CARRIER OR OTHER BAILEE (1) (WHETHER NAMED BY THE BUYER OR NOT) FOR THE PURPOSE OF TRANSMISSION TO THE BUYER, AND DOES NOT RESERVE THE RIGHT OF DISPOSAL, HE IS DEEMED TO HAVE UNCONDITIONALLY APPROPRIATED THE GOODS TO THE CONTRACT (2).

1. Such as a warehouseman (*a*) or other person (*b*) agreed upon or designated by the buyer to receive the goods.

(*a*) Bradford v. Marbury, 12 Ala. 520.
Hunter v. Wright, 12 Allen, 548, 550.

(*b*) Wing v. Clark, 24 Me. 366, 373.

2. Dutton v. Solomonson, 3 B. & P. 582, 584.
Fragano v. Long, 4 B. & C. 219.
Wait v Baker, 2 Exch. p. 7.
The Mary and Susan, 1 Wheat. 25, 39.
Halliday v. Hamilton, 11 Wal. 560, 564.
Putnam v. Tillotson, 13 Met. 517, 520.
Merchant v. Chapman, 4 Allen, 362, 364.
Dolan v. Green, 110 Mass. 322, 323.
Frank v. Hoey, 128 Mass. 263, 264.
Krulder v. Ellison, 47 N.Y. 36.
Wilcox Plate Co. v. Green, 72 N.Y. 17.

Schmertz v. Dwyer, 53 Pa. St. 335.
Phila. etc. R. R. Co. v. Wireman, 88 Pa. St. 264.
Garbracht v. Commonwealth, 96 Pa. St, 449.
Diversy v. Kellogg, 44 Ill. 114.
Pike v. Baker, 53 Ill. 163.
Stafford v. Walter, 67 Ill. 83.
Sarbecker v. State, 65 Wis. 171.
Herron v. State, 51 Ark. 133.
Dunn v. State, 82 Ga. 27.
Brooks v. Paper Co. 94 Tenn. 701.

The goods must, of course, be in all respects according to the contract.

Wait v. Baker, 2 Exch. p. 7.
Diversy v. Kellogg, 44 Ill. 114, 119.
Wolf v. Dietzsch, 75 Ill. 205.
Alsberg v. Latta, 30 Iowa 442, 446.

An agreement as to the mode of transmission to the buyer may be implied from usage where the mode is not expressly agreed on by the parties or directed by the buyer. In such case the usual mode is supposed to be in contemplation of the parties.

Thus a purchase with general directions to ship the goods to the buyer will authorize a shipment in the usual way, and unless a different intention appears the carrier becomes the bailee of the buyer and the property vests in the buyer as soon as they are thus unconditionally shipped.

Whiting v. Farrand, 1 Conn. 60, 63.
Putnam v. Tillotson, 13 Met. 517, 520.
Magruder v. Gage, 33 Md. 344, 348.
Comstock v. Affoelter, 50 Mo. 411, 412.
Watkins v. Paine, 57 Ga. 50, 52.

Where goods are ordered and shipped C.O.D. (collect on delivery), the carrier is said to be the

agent of the buyer to receive the goods from the seller and the agent of the seller to collect the price from the buyer, and the sale is complete when the goods are delivered to the carrier.

Pilgreen v. State, 71 Ala. 368.
State v. Intoxicating Liquors, 73 Me. 278.
State v. Carl, 43 Ark. 353.
Brechwald v. People, 21 Ill. App. 213.
Commonwealth v. Fleming, 130 Pa. St. 138.
Railroad v. Barnes, 104 N.Car. 25.
State v. Flanagan, 38 W.Va. 53.
And see Higgins v. Murray, 73 N.Y. 252.
Contra, Baker v. Bourcicault, 1 Daly, 23.
United States v. Shriver, 23 Fed. 134.
United States v. Cline, 26 Fed. p. 517.
State v. O'Neil, 58 Vt. 140.

If it appears that the seller undertakes to deliver the goods at the place of their destination, assuming the risk in the transmission, the carrier is the bailee of the seller and the property in the goods does not vest in the buyer until they are delivered at such a place (*a*).

It was so held where the contract was that milk in cans should be shipped daily by the seller from Dundee, Illinois, to the place of business of the buyer in Chicago, at the expense of the seller (*b*); and where it was the general practice of the seller, a business house in Chicago, to deliver at the homes of his customers in the city bulky articles purchased by them (*c*).

(*a*) Dunlop v. Lambert, 6 Cl. & F. 600, 620.
Kribs v. Jones, 44 Md. 396, 408.
Bloyd v. Pollocks, 27 W. Va. 75, 128.
McLaughlin v. Marston, 78 Wis. 670, 676.
McNeal v. Braun, 53 N.J.L. 617, 621.
Braddock Glass Co. v. Irwin, 153 Pa. St. 440, 443.

(*b*) Devine v. Edwards, 101 Ill. 138, 141.
See also Suit v. Woodhall, 113 Mass. 391, 394.
Weil v. Golden, 141 Mass. 364, 368.
Berger v. State, 50 Ark. 20, 23.
McNeal v. Braun, 53 N.J.L. p. 623.

(*c*) Charles v. Lasher, 20 Ill. App. 36, 39.
Hague v. Porter, 3 Hill 141, 144.

Rule 24.—(A.) WHERE THERE IS A CONTRACT FOR THE SALE OF SPECIFIC GOODS OR WHERE GOODS ARE SUBSEQUENTLY APPROPRIATED TO THE CONTRACT, THE SELLER MAY, BY THE TERMS OF THE CONTRACT OR APPROPRIATION, RESERVE THE RIGHT OF DISPOSAL OF THE GOODS UNTIL CERTAIN CONDITIONS ARE FULFILLED (1). IN SUCH CASE, NOTWITHSTANDING THE DELIVERY OF THE GOODS TO THE BUYER, OR TO A CARRIER OR OTHER BAILEE FOR THE PURPOSE OF TRANSMISSION TO THE BUYER, THE PROPERTY IN THE GOODS DOES NOT PASS TO THE BUYER UNTIL THE CONDITIONS IMPOSED BY THE SELLER ARE FULFILLED (2).

QUALIFICATION: IN SEVERAL OF THE STATES THE RULE DOES NOT HOLD AS AGAINST A SUBSEQUENT BONA FIDE PURCHASER (3) OR ATTACHING OR EXECUTION CREDITOR (4) OF THE BUYER WITHOUT NOTICE OF THE CONDITIONS.

1. Such as the payment of the price (*a*) or the giving of security for the price (*b*).

(*a*) Herring v. Hoppock, 15 N.Y. 409, 411.
Cole v. Mann, 62 N.Y. 1.
Fosdick v. Schall, 99 U.S. 235, 250.

Davison v. Davis, 125 U.S. 90.
Fleury v. Tufts, 25 Ill. App. 101.

(*b*) Whitney v. Eaton, 15 Gray, 225, 226.
Russell v. Minor, 22 Wend. 659.
Osborn v. Gantz, 60 N.Y. 540.
Campbell Press Co. v. Walker, 114 N.Y. 7.
Seed v. Lord, 66 Me. 580.
Hooven v. Burdette, 153 Ill. 672.

"Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

Elgee Cotton Cases, 22 Wal. p. 188.
Beardsley v. Beardsley, 138 U.S. p. 266.

As to the waiver of the condition see:
Farlow v. Ellis, 15 Gray, 229.
Thompson v. Wedge, 50 Wis. 642.
Gorham v. Holden, 79 Me. 317.
Peabody v. Maguire, 79 Me. 572.
Manchester Works v. Truesdale, 44 Minn. 115.
See also r 31, n 2.

A provision in a bill of sale that the seller shall retain possession of the goods until, and as security for, the payment of the price, is not inconsistent with an actual sale, by which title passes to the buyer.

Arkansas Cattle Co. v. Mann, 130 U S. 69.

2. Brandt v. Bowlby, 2 B. & Ad. 932.
Godts v. Rose, 17 C.B. 229.
Mirabita v. Bank, 3 Ex. D. 164, 172.
Fosdick v. Schall, 99 U.S. 235, 250.
Harkness v. Russell, 118 U.S. 663, 681.
Segrist v. Crabtree, 131 U.S. 292.

Summerson v. Hicks, 134 Pa. St. 566.
Hineman v. Matthews, 138 Pa. St. 204.
Coggill v. R.R. Co. 3 Gray, 545.
Hirschorn v. Canney, 98 Mass. 149.
Cole v. Berry, 42 N.J.L 308.
Marvin Safe Co. v. Norton, 48 N.J.L. 410.
Campbell Mfg. Co. v. Pub. Co. (N.J. 1894), 29 Atl. Rep. 681.
Lewis v. McCabe, 49 Conn. 148.
New Haven Wire Co. Cases, 57 Conn. 385.
Lanman v. McGregor, 94 Ind. 301.
Weinstein v. Freyer, 93 Ala. 257.

But where goods (musical instruments, sewing machines, furniture, and the like), are delivered under a contract in the form of a lease, with the property in the goods dependent upon the payment of the last installment of the so-called rents, while the transaction is generally held to be a conditional sale and not a lease (*a*), yet it is a question in each case depending on the terms of the contract and the circumstances of the case whether the transaction is to be treated as a sale upon condition precedent or as one upon condition subsequent (*b*).

(*a*) Miller v. Steen, 30 Cal. 402.
Currier v. Knapp, 117 Mass. 324.
Hine v. Roberts, 48 Conn. 267.
Loomis v. Bragg, 50 Conn. 228.
Carpenter v. Scott, 13 R.I. 477.
Whitcomb v. Woodworth, 54 Vt. 544.
Collender Co. v. Marshall, 57 Vt. 232.
Gorham v. Holden, 79 Me. 317.
Hays v. Jordan, 85 Ga. 748.
Puffer Mfg. Co. v. Lucas, 112 N. Car. 377.

(*b*) See Murch v. Wright, 46 Ill. 487.
Lucas v. Campbell, 88 Ill. 447.
Latham v. Sumner, 89 Ill. 233.

Hervey v. Locomotive Works, 93 U.S. 664.
Heryford v. Davis, 102 U.S. 235.
Greer v. Church, 13 Bush, 430.
Stadtfeld v. Huntsman, 92 Pa. St. 53.
Farquhar v. McAlevy, 142 Pa. St. 233.
Singer Mfg. Co. v. Cole, 4 Lea, 439.
Cowan v. Singer Mfg. Co. 92 Tenn. 376.
Knittel v. Cushing, 57 Tex. 354.
Hintermister v. Lane, 27 Hun, 499.
Bailey v. Hervey, 135 Mass. 172.
Dederick v. Wolfe, 68 Miss. 500.
Parke v. Lumber Co. 101 Cal. 37.

3. Brundage v. Camp, 21 Ill. 330, 336.
M.C. R.R. Co. v. Phillips, 60 Ill. 190, 194.
W.U. R.R. Co. v. Wagner, 65 Ill. 197.
Young v. Bradley, 68 Ill. 553.
Fifield v. Bank, 148 Ill. 163.
Stadtfeld v. Huntsman, 92 Pa. St. 53.
Brunswick v. Hoover, 95 Pa. St. 508.
Dearborn v. Raysor, 132 Pa. St. 231.
Vaughn v. Hopson, 10 Bush, 337.
Greer v. Church, 13 Bush, 430.
Hall v. Hinks, 21 Md. 406, 418.
Lincoln v. Quynn, 68 Md. 299, 304.
Central Trust Co. v. Mfg. Co. 77 Md. 202, 222.
See also Smith v. Lynes, 5 N.Y. 41.
Comer v. Cunningham, 77 N.Y. 391.
Parker v. Baxter, 86 N.Y. 586.

4. Murch v. Wright, 46 Ill. 487.
Van Duzor v. Allen, 90 Ill. 499.
Martin v. Mathiot, 14 S. & R. 214.
Haak v. Linderman, 64 Pa. St. 499.
Forrest v. Nelson, 108 Pa. St. 481.
Farquhar v. McAlevy, 142 Pa. St. 233.
Ott v. Sweatman, 166 Pa. St. 217.

There is great force in the argument that where the contract of sale is such that the buyer is liable for the price a reservation of the title as security for the payment of the price is in the nature of a

secret lien upon the goods, and therefore within the policy of the chattel mortgage acts (*a*).

And many of the states by recent statutes have expressly declared that no agreement that goods bargained and delivered to another shall remain the property of the seller shall be valid as against innocent third persons unless the agreement be in writing duly acknowledged and filed for record (*b*)

(*a*) Ketchum v. Watson, 24 Ill. 591.
Lucas v. Campbell, 88 Ill. 449, 450.
Daniels v. Thompson, 48 Ill. App. 393.
Hervey v. Locomotive Works, 93 U.S. 664, 672.
Heryford v. Davis, 102 U.S. 235, 246.
Hart v. Barney, 7 Fed. 543, 550.
Knittel v. Cushing, 57 Tex. 354, 361.
Palmer v. Howard, 72 Cal. 293, 295.
Thompson v. Paret, 94 Pa. St. 275, 280.
Peek v. Heim, 127 Pa. St. 500.
Chickering v. Bastress, 130 Ill. 206.
Colorado Sav. Bank v. Theater Co. (Colo. 1894), 36 Pac. Rep. 902.
See also Winchester Co. v. Carman, 109 Ind. 31.

(*b*) For a list of such states, see Mack v. Story, 57 Conn. p. 415.

Rule 24.—(B.) WHERE GOODS ARE SHIPPED, AND BY THE BILL OF LADING THE GOODS ARE DELIVERABLE TO THE ORDER OF THE SELLER OR HIS AGENT, THE SELLER IS PRIMA FACIE DEEMED TO RESERVE THE RIGHT OF DISPOSAL.

The St. Joze Indiano, 1 Wheat. 208.
Merchants' Nat. Bank v. Bangs, 102 Mass. p. 295.
Dows v. Nat. Bank, 91 U.S. 618, 631.
Ogg v. Shuter, 1 C.P.D. 47.

Mirabita v. Bank, 3 Ex. D. p. 172.
Farmers' Bank v. Logan, 74 N.Y. 568, 578.
Jones v. Brewer, 79 Ala. 545, 549.
See Joyce v. Swann, 17 C.B.N.S. 84.
Straus v. Wessel, 30 Ohio St. 211.
Lumber Co. v. Hardware Co. 53 Ark. 198.
Erwin v. Harris, 87 Ga. 333.

Prima facie the intention of the shipper in delivering the goods on board is that they shall be transmitted by the carrier as bailee for the person indicated by the bill of lading. Such was held to have been the intention where the seller took the bill of lading to his own order, though the goods were shipped on board the buyer's own vessel (*a*); though the goods were shipped to the buyer's place of residence in care of the buyer (*b*); though the invoice of the goods stated that they were shipped on account of the buyer (*c*).

(*a*) Turner v. Trustees, 6 Exch. 543.
Gabarron v. Kreeft, L.R. 10 Ex. 274.

(*b*) Ward v. Taylor, 56 Ill. 494.
See also Libby v. Ingalls, 124 Mass. 503.

(*c*) Shepherd v. Harrison, L.R. 5 H.L. 116.
Dows v. Nat. Bank, 91 U.S. 618, 630.
Seeligson v. Philbrick, 30 Fed. 600.

The bill of lading represents the goods, and the transfer of the bill of lading passes property in the goods according to the intention of the parties (*a*) and operates as a symbolical delivery of the goods (*b*).

(*a*) Bank of Rochester v. Jones, 4 N.Y. 497, 501.
Forbes v. R.R. Co. 133 Mass. 154.
Sewell v. Burdick, 10 App. Cas. 74.

(*b*) Gibson v. Stevens, 8 How. 384, 399.
M.C. R.R. Co. v. Phillips, 60 Ill. 190, 198.

Peters v. Elliott, 78 Ill. 321, 327.
Nat. Bank v. Dearborn, 115 Mass. 219, 222.
Commercial Bank v. Pfeiffer, 108 N.Y. 242, 250.

Accordingly, it is a common practice for the seller to secure an advancement on the goods by a transfer of the bill of lading to a bank together with a bill of exchange drawn on the buyer for the whole or part of the price.

Marine Bank v. Wright, 48 N.Y. 1.
First Nat. Bank v. Kelly, 57 N.Y. 34.
First Nat. Bank v. Crocker, 111 Mass. 163.
Nat. Bank v. Bayley, 115 Mass. 228.
Emery v. Bank, 25 Ohio St. 360.
Taylor v. Turner, 87 Ill. 296.
Holmes v. Bank, 87 Pa. St. 525.
Richardson v. Nathan, 167 Pa. St. 513.
Halsey v. Warden, 25 Kan. 128.
Merchants' Bank v. McGraw, 15 U.S. App. 332.
And see Nat. Bank v. Bank, 91 U.S. 92.
Hathaway v. Haynes, 124 Mass. 311.
Security Bank v. Luttgen, 29 Minn. 363.
Mirabita v. Bank, 3 Ex. D. p. 173.
See also Farmers' Bank v. Atkinson, 74 N.Y. 587.
Moors v. Kidder, 106 N.Y. 32.
New Haven Wire Co. Cases, 57 Conn. 352.

And where a bill of exchange for the price of the goods is sent forward with the bill of lading to the seller's agent to be presented to the buyer, for acceptance or payment, an intention on the part of the seller is presumed that the transfer of the bill of lading, and the property thereby represented, should be conditional on the acceptance or payment, as the case may be, of the bill of exchange (*a*).

But where the bill of lading is taken in the name of the consignee, and the goods are forwarded to him accordingly, such secret intention

will not avail the consignor as against a *bona fide* purchaser from the consignee (*b*).

(*a*) Shepherd v. Harrison, L.R. 4 Q.B. 196; Ib. 493; 5 H. L. 116.
Cayuga Bank v. Daniels, 47 N.Y. 631.
Stollenwerck v. Thacher, 115 Mass. 224.
Dows v. Nat. Bank, 91 U.S. 618.
Hieskell v. Bank, 89 Pa. St. 155.
Penn. R.R. Co. v. Stern, 119 Pa. St. 24.

(*b*) Wigton v. Bowley, 130 Mass. 252, 254.
Robinson v. Pogue, 86 Ala. 257.

Rule 25.—UNLESS OTHERWISE AGREED (1), THE GOODS REMAIN AT THE SELLER'S RISK UNTIL THE PROPERTY THEREIN IS TRANSFERRED TO THE BUYER (2), BUT WHEN THE PROPERTY THEREIN IS TRANSFERRED TO THE BUYER, THE GOODS ARE AT THE BUYER'S RISK WHETHER DELIVERY HAS BEEN MADE OR NOT (3).

PROVIDED THAT WHERE DELIVERY HAS BEEN DELAYED THROUGH THE FAULT OF EITHER BUYER OR SELLER THE GOODS ARE AT THE RISK OF THE PARTY IN FAULT AS REGARDS ANY LOSS WHICH WOULD NOT HAVE OCCURRED BUT FOR SUCH FAULT (4).

EXPLANATION: THIS RULE DOES NOT AFFECT THE DUTIES OR LIABILITIES OF EITHER SELLER OR BUYER AS A BAILEE OF THE GOODS OF THE OTHER PARTY (5).

1. As a general rule *res perit domino*, but the parties may agree that the property shall be in

the one and the risk in the other. And where the goods were left with the seller with a stipulation that they should be at his risk for two months, it was held that a loss occurring after that period without the fault of the seller, was to be borne by the buyer, whether the property did or did not pass to him.

Martineau v. Kitching, L.R. 7 Q.B. 436.
See also Castle v. Playford, L.R. 7 Ex. 98, 100.
The Elgee Cotton Cases, 22 Wal. 180, 194.
Barker v. Freeland, 91 Tenn. 112, 118.

2. "The common law fixes the risk where the title resides."

Joyce v. Adams, 8 N.Y. 291, 296.
Brock v. O'Donnell, 45 N.J.L. 441, 443.
McCandlish v. Newman, 22 Pa. St. 460, 465.
Elphick v. Barnes 5 C.P.D. 321, 326.

3. Lansing v. Turner, 2 Johns. 13, 16.
Terry v. Wheeler, 25 N.Y. 520, 524.
Bissell v. Balcom, 39 N.Y. 275, 279.
Tarling v. Baxter, 6 B. & C. 360.
Sweeting v. Turner, L.R. 7 Q.B. p. 313.
Wing v. Clark, 24 Me. 366, 372.
Sweeney v. Owsley, 14 B. Mon. 413.
Wade v. Moffett, 21 Ill. 110, 112.
Seckel v. Scott, 66 Ill. 106, 108.
Merchants' Dispatch Co. v. Smith, 76 Ill. 542, 543.
Leonard v. Davis, 1 Black, 476, 483.
Ruthrauff v. Hagenbuch, 58 Pa. St. 103.
Whitcomb v. Whitney, 24 Mich. 486.
Goddard v. Binney, 115 Mass. 450, 455.
Townsend v. Hargraves, 118 Mass. 325, 332.
Bertelson v. Bower, 81 Ind. 512.

4. Martineau v. Kitching, L.R. 7 Q.B. 436, 456.
McConihe v. R.R. Co. 20 N.Y. 495, 497.

5. McCandlish v. Newman, 22 Pa. St. p. 465.
Bertelson v. Bower, 81 Ind. p. 514.

After the transfer of the property, and until the time for the delivery of the goods has arrived, the seller is subject to the same liability in respect of the care and custody thereof, as a bailee for reward (*a*).

After default made by the buyer in removing or in accepting delivery thereof, the seller is subject to the same liability as a gratuitous bailee (*b*).

The principle is, that part of the consideration for the price is the care of the goods by the seller until the expiration of the specified time, if any, or a reasonable time for the buyer to take possession. After that time the seller receives no value for the custody of the goods, as he has performed all that was incumbent on him.

(*a*) Barrow v. Window, 71 Ill. 214, 219.
Cloyd v. Steiger, 139 Ill. 41.

(*b*) Lansing v. Turner, 2 Johns. 13, 17.
Koon v. Brinkerhoof, 39 Hun, 130, 132.

As to contracts with carriers and inevitable deterioration due to transit:

See rs 35 (B), 36.

Transfer of Title.

Rule 26.—AS A GENERAL RULE (1), WHERE GOODS ARE SOLD BY A PERSON WHO IS NOT THE OWNER THEREOF, AND WHO DOES NOT SELL THEM UNDER THE AUTHORITY OR WITH THE CONSENT OF THE OWNER, THE BUYER ACQUIRES NO BETTER TITLE TO THE GOODS THAN THE SELLER HAD (2), UNLESS THE OWNER OF THE GOODS IS BY HIS CONDUCT PRECLUDED FROM DENYING THE SELLER'S AUTHORITY TO SELL (3).

EXPLANATION: THE RULE DOES NOT AFFECT THE VALIDITY OF ANY CONTRACT OF SALE UNDER ANY SPECIAL COMMON LAW (4) OR STATUTORY (5) POWER OF SALE OR UNDER THE ORDER OF A COURT OF COMPETENT JURISDICTION (6).

1. It is a general rule of law that a sale by a person who has no right to sell, is not valid against the rightful owner (*a*)—that the buyer takes only such title as his seller has or is authorized to transfer (*b*).

(*a*) Ventress v. Smith, 10 Pet. p. 175.

(*b*) Barnard v. Campbell, 55 N.Y. p. 461.

2. Saltus v. Everett, 20 Wend. 267.
Smith v. Clews, 114 N.Y. 190.
Soltau v. Gerdau, 119 N.Y. 380.
Stanley v. Gaylord, 1 Cush. 536.
Moody v. Blake, 117 Mass. 23.
McMahon v. Sloan, 12 Pa. St. 229.
Quinn v. Davis, 78 Pa. St. 15.
Fawcett v. Osborn, 32 Ill. 411, 424.
Klein v. Seibold, 89 Ill. 540.

McCully v. Hardy, 13 Ill. App. 631.
Wilson v. Crocket, 43 Mo. 216.
Cundy v. Lindsay, 3 App. Cas. 459.

In England, where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (*a*).

The English doctrine as to sales in market overt is not recognized in this country (*b*).

Where goods are lost or stolen or in the possession of a mere bailee (*c*), no person can acquire the title to them from the finder or thief or mere bailee, and the owner may recover them from any person who claims them (*d*), or may recover their value from any one who has disposed of them or in any way converted them to his own use (*e*).

(*a*) See Crane v. London Dock Co. 5 B. & S. 313.
Hargreave v. Spink, (1892) 1 Q.B. 25.

(*b*) Dame v. Baldwin, 8 Mass. 518.
Easton v. Worthington, 5 Serg. & R. 130.
Ventress v. Smith, 10 Pet. p. 176.
Hoffman v. Carow, 22 Wend. pp. 290, 294.
Fawcett v. Osborn, 32 Ill. p. 426.
Bryant v. Whitcher, 52 N.H. p. 159.

(*c*) That a mere bailee can not give a good title see p. 102.

(*d*) Dame v. Baldwin, 8 Mass. 518.
Roland v. Gundy, 5 Ohio, 202.
Ingersoll v. Emmerson, Smith (Ind.) 77.
Stanley v. Gaylord, 1 Cush. p. 545.
Burton v. Curyea, 40 Ill. 320.

(*e*) Hoffman v. Carow, 22 Wend. 285.
Brower v. Peabody, 13 N.Y. 121.
Pease v. Smith, 61 N.Y. 477.
Fawcett v. Osborn, 32 Ill. 411.

Sharp v. Parks, 48 Ill. 511.
Gilmore v. Newton, 9 Allen, 171.
Heckle v. Lurvey, 101 Mass. 344.
Robinson v. Bird, 158 Mass. 360.
Robinson v. Skipworth, 23 Ind. 311.
Breckenridge v. McAfee, 54 Ind. 141.
Miller Piano Co. v. Parker. 155 Pa. St. 208.
See also Havana Drill Co. v. Ashurst, 148 Ill. 115.

3. A sale, made by a person not thereto authorized, may be good, as against the owner, by way of estoppel; as where the owner of goods clothes another with the apparent title or power of disposition, and an innocent person is thereby induced to buy them (*a*); or where the owner of goods in any way culpably induces a sheriff to levy upon or sell his own goods on the faith and understanding that they belonged to the defendant in execution (*b*); or where the owner of goods with full knowledge stands by in silence and suffers another to treat them as his own, whereby a third person is led to buy them in good faith (*c*).

(*a*) Pickering v. Busk, 15 East, 38.
Cowdrey v. Vandenburgh, 101 U.S. 572, 575.
Wood's Appeal, 92 Pa. St. 379, 390.
Stewart v. Munford, 91 Ill. 58.
Grace v. McKissack, 49 Ala. 163.
Powers v. Harris, 68 Ala. 409.
Dias v. Chickering, 64 Md. 348.
Preston v. Witherspoon, 109 Ind. 457.

(*b*) Stephens v. Baird, 9 Cowen, 274.
Pickard v. Sears, 6 A. & E. 469.
Dewey v. Field, 4 Met. 381.
Stiff v. Ashton, 155 Mass. 130.
Leeper v. Hersman, 58 Ill. 218.
Colwell v. Brower, 75 Ill. 516.
Kinnear v. Mackey, 85 Ill. 96.
Reiss v. Hanchett, 141 Ill. 419.

(*c*) Gregg v. Wells 10 A. & E. 90.
Thompson v. Blanchard, 4 N.Y. 303, 309.
Tracy v. Lincoln, 145 Mass. 357.
Brooks v. Record, 47 Ill. 30.
Harding v. LeMoyne, 114 Ill. p. 74.
Anderson v. Hubble, 93 Ind. pp. 573-6.

Where the true owner of goods holds out another, or culpably allows him to appear, as the owner of, or as having full power of disposition over the goods, and innocent third parties are thus led into dealing with such apparent owner, or person having the apparent power of disposition, they will be protected. Their rights, in such cases, do not depend upon the actual title or authority of the party with whom they have directly dealt, but are derived from the conduct of the real owner, which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party, upon the faith of whose title, or power, they dealt (*a*).

The primary ground of the doctrine of estoppel *in pais* is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted (*b*). He who has been silent as to his alleged right when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent (*c*).

(*a*) McNeil v. Bank, 46 N.Y. 325, 329.
Anderson v. Armstead, 69 Ill. 454.
Nixon v. Brown, 57 N.H. 34, 38.
Hill v. Wand, 47 Kan. 340, 346.
And see Spooner v. Cummings, 151 Mass. 313, 315.

(*b*) Hill v. Epley, 31 Pa. St. p. 334.
Gregg v. Von Phul, 1 Wal. p. 281.
Robbins v. Moore, 129 Ill. p. 54.

(c) Morgan v. R.R. Co. 96 U.S. p. 720.
Niven v. Belknap, 2 Johns. p. 589.
McLaurie v. Thomas, 39 Ill. p. 296.
Lloyd v. Lee, 45 Ill. p. 280.
Logan v. Gardner, 136 Pa. St. p. 600.

If the possession of the seller is that of a mere bailee, the rule which declares that, where one of two innocent persons must suffer, the loss should fall on him whose act or omission made the loss possible, does not apply.

Miller Piano Co. v. Parker, 155 Pa. St. 208.
Roland v. Gundy, 5 Ohio, 202.
Covill v. Hill, 4 Denio, 323.
Ingersoll v. Emmerson, Smith (Ind.) 77.
Klein v. Seibold, 89 Ill. 540.
Hutchinson v. Oswald, 17 Ill. App. 28
Montague v. Ficklin, 18 Ill. App. 99.
Levi v. Booth, 58 Md. 305.
Cole v. North-Western Bank, L.R. 10 C.P. p. 362.
Thatcher v. Moors, 134 Mass. p. 163.

At common law, a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use (*a*), or to transfer the title thereto by way of barter (*b*).

(*a*) Paterson v. Tash, 2 Strange, 1178.
Cole v. North-Western Bank, L.R. 10 C.P. p. 362.
Kinder v. Shaw, 2 Mass. 398.
Mich. State Bank, v. Gardner, 15 Gray, p. 374.
Laussatt v. Lippincott, 6 S. & R, p. 392.

Macky v. Dillinger, 73 Pa. St. p. 90.
Stevens v. Wilson, 6 Hill, p. 513; S.C. 3 Denio, p. 473.
Howland v. Woodruff, 60 N.Y. p. 79.
Warner v. Martin. 11 How. p. 224.
Allen v. St. Louis Bank, 120 U.S. 20.
Wright v. Solomon, 19 Cal. 64.
Gray v. Agnew, 95 Ill. 315.

First Nat. Bank v. Schween, 127 Ill. 573.
McCreary v. Gaines, 55 Tex. 485.
Commercial Bank v. Hurt, 99 Ala. 130.

(*b*) Guerreiro v. Peile, 3 B. & Ald. 616.
Potter v. Dennison, 5 Gilm. 590.
Wheeler v. Givan, 65 Mo. 89, 93.

In England and in several of the states there are statutes for the protection of innocent parties who deal with a mercantile agent intrusted with the possession of goods or the documents of title thereto.

England, Factors Act, 1889.
New York, Acts of 1830, C. 179.
Massachusetts, Public Statutes C. 71.
Pennsylvania, Brightly's Purdon's Dig. p. 773.
Lee v. Butler, (1893) 2 Q.B. 318.
Helby v. Matthews, (1894) 2 Q.B. 262.
Soltau v. Gerdau, 119 N.Y. 380.
Thatcher v. Moors, 134 Mass. 156.
Macky v. Dillinger, 73 Pa. St. 85.

4. At common law, where goods are pledged as security for the payment of a debt, the pledgee, when the debt becomes due and the debtor remains in default after reasonable notice to redeem, may sell the goods at public auction, without any judicial proceeding, upon giving due notice of the time and place of sale.

Stearns v. Marsh, 4 Denio, 227, 230.
Parker v. Brancker, 22 Pick. 46.
Washburn v. Pond, 2 Allen, 477.
Stevens v. Bank, 31 Conn. 146.
Cushman v. Hayes, 46 Ill. 145.
McDowell v. Steel Works, 124 Ill. 491.
Nat. Bank v. Baker, 128 Ill. 533.
Conyngham's Appeal, 57 Pa. St. 474.
And see Belden v. Perkins, 78 Ill. 449.
Talty v. Freedman's Co. 93 U.S. 321.

So the master of a vessel is authorized by law to sell the ship or cargo in case of urgent necessity (*a*); as where the ship is lying stranded upon a beach and cannot be delivered from the peril without the hazard of an expense disproportionate to her real value (*b*); or where the cargo is in a bad and perishing condition (*c*), or will have to be kept in warehouses at great expense (*d*), and the master cannot within a reasonable time communicate with the owner of the ship or cargo and obtain his directions (*e*).

(*a*) Butler v. Murray, 30 N.Y. 97.
Howland v. Ins. Co. 131 Mass. 254.
Myers v. Baymore, 10 Pa. St. 118.
Australasian Co. v. Morse, L.R. 4 P.C. 229.

(*b*) The Sarah Ann, 2 Sumner, 206, 215.
New England Ins. Co. v. The Sarah Ann, 13 Pet. 387, 400.
Page v. Cowasjee, L.R. 1 P.C. p. 144.

(*c*) Butler v. Murray, 30 N.Y. 88.
Australasian Co. v. Morse, L.R. 4 P.C. 227.

(*d*) Acatos v. Burns, 3 Ex. D. p. 290.

(*e*) The Amelie, 6 Wal. 18, 26.
Acatos v. Burns, 3 Ex. D. 282, 289.
Bryant v. Ins. Co. 13 Pick. 543, 552.
Gates v. Thompson, 57 Me. 442.

5. A sheriff may sell the goods (not exempt from execution) (*a*) of a judgment debtor (*b*) under an execution based on an unsatisfied (*c*) judgment and thereby transfer to the buyer the debtor's title (*d*), although the judgment may afterwards be reversed (*e*) unless it was void for want of jurisdiction (*f*), or the buyer was the judgment creditor (*g*), his attorney (*h*) or assignee (*i*).

(*a*) Paxton v. Freeman, 6 J. J. Marsh, 234.
Williams v. Miller, 16 Conn. 143, 147.

Hetrick v. Campbell, 14 Pa. St. 263.
Johnson v. Babcock, 8 Allen, 583.

(*b*) Champney v. Smith, 15 Gray, 512.
Coombs v. Gordon, 59 Me. 111.
Bryant v. Whitcher, 52 N.H. 158.
Samuel v. Agnew, 80 Ill. 553, 556.

(*c*) Wood v. Colvin, 2 Hill, 566, 567.
Kennedy v. Dunklee, 1 Gray, 65, 67.

(*d*) Freeman v. Caldwell, 10 Watts, 9, 10.
Griffith v. Fowler, 18 Vt. 390, 392.
Osterman v. Baldwin, 6 Wal. 116.
Bishop v. O'Conner, 69 Ill. p. 434.

(*e*) Bank of U.S. v. Bank of Washington, 6 Pet. 8, 17.
Feaster v. Fleming, 56 Ill. 457.

(*f*) Camp v. Wood, 10 Watts, 118, 120.
Fergus v. Woodworth, 44 Ill. p 384.

(*g*) Dater v. R.R. Co. 2 Hill, 629, 633.
Gott v. Powell, 41 Mo. 416, 420.
Dickerman v. Burgess, 20 Ill. 266, 279.

(*h*) Galpin v. Page, 18 Wal. 350, 373.
Hayes v. Cassell, 70 Ill. 669, 671.

(*i*) McJilton v. Love, 13 Ill. 486, 495.
Reynolds v. Hosmer, 45 Cal. 616, 629.

As to the sale of goods by common carriers, innkeepers, warehousemen, and others having liens thereon:

See Rev. St. Ill. ch. 141.

6. A judicial sale is one which is made by a court of competent jurisdiction in a pending suit, through its authorized agent (*a*). Where a sale is conducted by a master in chancery, commissioner, or other functionary authorized by the court to conduct the sale, the buyer, before the confirmation of the sale, must satisfy himself that the title is not in a stranger to the suit (*b*), and that the sale has

been made according to the decree or order of the court (c). In such case the rule *caveat emptor* applies.

(a) Terry v. Coles, 80 Va. 701.
Williamson v. Berry, 8 How. 547.
Hart v. Burch, 130 Ill. 432.

(b) King v. Gunnison, 4 Pa. St. 171, 172.
Long v. Weller, 29 Grattan, 347, 351.

(c) Williamson v. Berry, 8 How. 548.
Gray v. Brignardello, 1 Wal. 636.

Rule 27.—WHEN THE SELLER OF GOODS HAS A VOIDABLE TITLE THERETO, BUT HIS TITLE HAS NOT BEEN AVOIDED AT THE TIME OF THE SALE, THE BUYER ACQUIRES A GOOD TITLE TO THE GOODS, PROVIDED HE BUYS THEM IN GOOD FAITH AND WITHOUT NOTICE OF THE SELLER'S DEFECT OF TITLE.

White v. Garden, 10 C.B. 919.
Babcock v. Lawson, 4 Q.B.D. 400; S.C. 5 Q.B.D. 284.
Mowrey v. Walsh, 8 Cow. 238.
Paddon v. Taylor, 44 N.Y. 371.
Rowley v. Bigelow, 12 Pick. 307.
Hoffman v. Noble, 6 Met. 68.
Easter v. Allen, 8 Allen,7.
Sinclair v. Healy, 40 Pa. St. 417.
Neff v. Landis, 110 Pa. St. 204.
Bell v. Cafferty, 21 Ind. 411.
Chicago Dock Co. v. Foster, 48 Ill. 507.
O. & M. R.R. Co. v. Kerr, 49 Ill. 458.
Mich. C. R.R. Co. v. Phillips, 60 Ill. 190.
Montague v. Hanchett, 20 Ill. App. 222.
Singer Mfg. Co. v. Sammons, 49 Wis. 316.
Bank v. Carriage Co. 70 Miss. 587.

See also r 28.

The rule applies where goods come into the possession of a person by a contract purporting, and by which the owner intended, to pass the property in and possession of the goods to him,—although under such circumstances of fraud as would enable the owner to avoid the contract as against him and reclaim the goods (*a*),—and such person, while thus in possession as the admitted owner, sells and delivers the goods to an innocent purchaser for value (*b*).

When a person obtains possession of goods, with the intention by the owner to transfer to *him* (*c*) both the property and possession, although the buyer has made a false and fraudulent representation in order to effect the contract or obtain the possession, the property vests in him as buyer until the defrauded owner has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent buyer has transferred, either the whole or a partial interest in the goods to an innocent transferee for value, the title of such transferee is good against the defrauded owner (*d*).

(*a*) Clough v. Ry. Co. L.R. 7 Ex. 26, 34.
Doane v. Lockwood, 115 Ill. 490, 496.

(*b*) Edmunds v. Transportation Co. 135 Mass. 283, 284.
Jennings v. Gage, 13 Ill. 610, 614.
Holland v. Swain, 94 Ill. 154.
Catlin v. Warren, 16 Ill. App. 418.
Shufeldt v. Pease, 16 Wis. 659.
Curme v. Rauh, 100 Ind. 247.
Robinson v. Levi, 81 Ala. 134.

(*c*) Cundy v. Lindsay, 3 App. Cas. pp. 464, 467.
Roof v. Morrisson, 37 Ill. App. 37.
La Salle Brick Co. v. Coe, 53 Ill. App. 506.
And see Samuel v. Cheney, 135 Mass. p. 281.

(*d*) Pease v. Gloahec, L.R. 1 P.C. 219, 229-30.
Old Dom. Steamship Co. v. Burckhardt, 31 Grattan, 664.

The rule also applies where the sale is voidable at the instance of the seller's creditors; as where the sale is fraudulent as to his creditors.

Neal v. Williams, 18 Me. 391.
Sleeper v. Chapman, 121 Mass. 404.
Comey v. Pickering, 63 N.H. 126.
Zoeller v. Riley, 100 N.Y. 102, 108.

"A *bona fide* purchaser is one who has bought property without notice of the claims of third parties thereto, upon the faith that no such claims exist, and who has therefor actually paid or parted with some valuable consideration or has in some way altered his legal condition for the worse. It is not enough that he has agreed to pay a valuable consideration before notice; he must have actually paid or parted with it before notice."

Hayden v. Driving Park, 63 Conn. 142, 147.
Dixon v. Hill, 5 Mich. 404, 408.
Schloss v. Feltus, 96 Mich. 619, 622.
Lytle v. Lansing, 147 U. S. 59, 70.
And see Redden v. Miller, 95 Ill. 346.

An attaching or execution creditor is not in the position of a purchaser for value as against the defrauded owner. He parts with nothing in exchange for the goods (*a*). Nor is an assignee in bankrupty or insolvency for the benefit of creditors. He takes subject to all equities and has no better title than the bankrupt or insolvent debtor (*b*).

(*a*) Buffington v. Gerrish, 15 Mass. 156.
Atwood v. Dearborn, 1 Allen, 483.
Thaxter v. Foster, 153 Mass. 151.

Thompson v. Rose, 16 Conn. 71.
Field v. Stearns, 42 Vt. 106.
Devoe v. Brandt, 53 N.Y. 462.
Wise v. Grant, 140 N.Y. 596.
Schweizer v. Tracy, 76 Ill. 345.
Amer. U. Ex. Co. v. Willsie, 79 Ill. 92.
Oswego Starch Factory v. Lendrum, 57 Iowa, 573.

(*b*) Bussing v. Rice, 2 Cush. 48.
Dugan v. Nichols, 125 Mass. 43.
Nichols v. Michael, 23 N.Y. 264, 269.
Donaldson v. Farwell, 93 U.S. 631.
Ratcliffe v. Sangston, 18 Md. 383.
Yeatman v. Sav. Institution, 95 U.S. 764.
O'Hara v. Jones, 46 Ill. 288.
Union Trust Co. v. Trumbull, 137 Ill. 146, 179.
Farley v. Lincoln, 51 N.H. 577.
Rogers v. Whitehouse, 71 Me. 222.
Belding v. Frankland 8 Lea, 68.
Singer v. Schilling, 74 Wis. 369.

It would seem that a creditor who takes goods in payment or extinguishment of a pre-existing debt (not merely as collateral security therefor (*a*),) should be regarded as a purchaser for value. And so it is held in some states (*b*), but this is denied in others (*c*).

(*a*) See Poor v. Woodburn, 25 Vt. 234.
Pope v. Pope, 40 Miss. 518.
Dovey's Appeal, 97 Pa. St. p. 162.
Goodwin v. Loan Co. 152 Mass. 199.
McGraw v. Solomon, 83 Mich. 442.

(*b*) Shufeldt v. Pease, 16 Wis. 659.
Butters v. Haughwout, 42 Ill. 18.
Kranert v. Simon, 65 Ill. 344.
Dovey's Appeal, 97 Pa. St. 153.
Bughman v. Central Bank, 159 Pa. St. 94.
Wert v. Naylor, 93 Ind. 431.
Spira v. Hornthall, 77 Ala. 137, 146.

See also r 50, n 6.

(c) **Barnard v Campbell, 58 N.Y. 73.**
Stevens v. Brennan, 79 N.Y. p. 258.
Sleeper v. Davis, 64 N.H. 59.
Henderson v. Gibbs, 39 Kan. 679.
Eaton v. Davidson, 46 Ohio St. 355.
Hurd v. Bickford, 85 Me. 217.
Reed v. Brown (Iowa, 1893), 56 N.W. Rep. 661.
Schloss v. Feltus (Mich. 1895), 61 N.W. Rep. 797.

The rule does not apply where there is no *de facto* contract, as where a swindler obtains possession of goods through the semblance of a sale to a responsible firm by means of a false statement that he was a member or agent of the firm. In such case the owner has no intention to transfer the title to the swindler and the firm has no intention to acquire the title—their minds do not meet—there is no contract—the swindler has no title and can give none.

Hardman v. Booth, 1 H. & C. 803.
Kingsford v. Merry, 1 H. & N. 503.
Cundy v. Lindsay, 3 App. Cas. 459.
Decan v. Shipper, 35 Pa. St. 239.
Barker v. Dinsmore, 72 Pa. St. 427.
Dean v. Yates, 22 Ohio St. 388.
Hamet v. Letcher, 37 Ohio St. 356.
Moody, v. Blake, 117 Mass. 23.
Aborn v. Transportation Co. 135 Mass, 283.
Rodliff v. Dallinger, 141 Mass. p. 6.
Collins v. Ralli, 20 Hun, 246; 85 N.Y. 637.
Hentz v. Miller, 94 N.Y. 64.
Soltau v. Gerdau, 119 N.Y. 380.
Alexander v. Swackhamer, 105 Ind. 81.
Peters Box Co. v. Lesh, 119 Ind. 98.

Rule 28.—IN MANY OF THE STATES—

(A) WHERE A PERSON HAVING SOLD GOODS CONTINUES IN POSSESSION OF THE GOODS, OR OF THE DOCUMENTS OF TITLE TO THE GOODS (1), THE DELIVERY OR TRANSFER BY THAT PERSON OF THE GOODS OR DOCUMENTS OF TITLE UNDER ANY SALE, PLEDGE, OR OTHER DISPOSITION THEREOF FOR VALUE, TO ANY PERSON RECEIVING THE SAME IN GOOD FAITH AND WITHOUT NOTICE OF THE PREVIOUS SALE, WILL HAVE THE SAME EFFECT AS TO SUCH RECEIVER AS THOUGH THERE WERE NO PREVIOUS SALE (2).

1. A bill of lading (*a*), and in several of the states a warehouse receipt (*b*), represents the goods therein described, and the possession of such a document is equivalent to the possession of the goods themselves. But it affords no better evidence of title than the actual possession of the goods themselves (*c*).

(*a*) Barber v. Meyerstein, L.R. 4 H.L. 317.
The Thames, 14 Wal. 98.
M.C. R.R. Co. v. Phillips, 60 Ill. 190.
W.U. R.R. Co. v. Wagner, 65 Ill. 197.
First Nat. Bank v. Kelly, 57 N.Y. 34.
Heiskell v. Bank, 89 Pa. St. 155.
Holmes v. Bailey, 92 Pa. St. 57.
Forbes v. R.R. Co. 133 Mass. 154.

(*b*) Gibson v. Stevens, 8 How. 384.
Bank of Rochester v. Jones, 4 N.Y. 497.
Adams v. Foley, 4 Iowa, 53.
Nat. Bank v. Dearborn, 115 Mass. 219.
Broadwell v. Howard, 77 Ill. 305.
Peters v. Elliott, 78 Ill. 321.
Taylor v. Turner, 87 Ill. 296.

Davis v. Russell, 52 Cal. 611.
Allen v. Maury, 66 Ala. 10.
Merchants' Bank v. Hibbard, 48 Mich. 118.
Bank of Newport v. Hirsch (Ark. 1894), 27 S.W. Rep. 74.

(c) Gurney v. Behrend, 3 E. & B. p. 633.
Cole v. North-Western Bank, L.R. 10 C.P. p. 363.
Dows v. Perrin, 16 N.Y. 325, 333.
Burton v. Curyea, 40 Ill. 320, 327.
Second Nat. Bank v. Walbridge, 19 Ohio St. 419.
Emery v. Bank, 25 Ohio St. 360.
Stollenwerck v. Thatcher, 115 Mass. 224.
Shaw v. R.R. Co. 101 U.S. 557, 565.
Allen v. Bank. 120 U.S. 20.
Canadian Bank v. McCrea, 106 Ill. 281.
Nat. Bank v. R.R. Co. 44 Minn. 236.
Commercial Bank v. Hurt (Ala. 1892), 12 South. Rep. 568.

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former

character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

Pollard v. Vinton, 105 U.S. 7, 8.
Misso. Pacific Ry. Co. v. McFadden, 154 U.S. 155, 162.

2. Edwards v. Harber, 2 T.R. 587.
Clow v. Woods, 5 S. & R. 275.
Stevens v. Gifford, 137 Pa. St. 219.
Lanfear v. Sumner, 17 Mass. 110.
Harlow v. Hall, 132 Mass. 232.
Patten v. Smith, 5 Conn. 196.
Thornton v. Davenport, 1 Scam. 296.
Ticknor v. McClelland, 84 Ill. 474.
Gradle v. Kern, 109 Ill. 557.
Huschle v. Morris, 131 Ill. 593.
Crawford v. Forristall, 58 N.H. 114.

It is a reasonable presumption that the owner of goods in actual possession thereof continues to be the owner while he remains in such possession. Men commonly act on this presumption. The fact that goods are left in the hands of their former owner, with nothing to indicate that his relation towards them is changed, gives him a false and deceptive credit, and puts it in his power to sell them again to an innocent purchaser (*a*). The object of the rule is to prevent persons from being misled by apparent ownership of goods where real ownership does not exist, but where a secret transfer has been made to another (*b*). Public policy requires that while goods remain in possession of the former owner they should, as to innocent third persons be regarded as his (*c*).

(*a*) Streeper v. Eckart, 2 Wharton, p. 306.
Stephens v. Gifford, 137 Pa. St. p. 228.

(*b*) Allen v. Massey, 17 Wal. p. 354.
Reed v. Eames, 19 Ill. p. 596.
Ticknor v. McClelland, 84 Ill. p. 474.

(*c*) Burnell v. Robertson, 5 Gilm. p. 291.
Norton v. Doolittle, 32 Conn. p. 410.
Davis v. Bigler, 62 Pa. St. p. 248.
Weeks v. Prescott, 53 Vt. p. 71.

While the rule is founded on policy for the prevention of fraud, it does not extend beyond what sound policy dictates. A person who would avail himself of the rule must also be diligent in taking possession. Where the same goods are sold to two different persons by contracts equally valid, and the second purchaser is without notice of the first contract, he who first lawfully obtains the possession is entitled to the goods.

Winslow v. Leonard, 24 Pa. St. 14.
Lanfear v. Sumner, 17 Mass. 110.
Veazie v. Somerby, 5 Allen, 280.
Burnell v. Robertson, 5. Gilm. 282.
Walker v. Collier, 37 Ill. 362.
Gradle v. Kern, 109 Ill. 557.
Coty v. Barnes, 20 Vt. 78.

So where a buyer takes possession at a time subsequent to the sale, but before the rights of creditors have accrued by attachment, execution, or the like, he can hold the property against the creditors.

Bartlett v. Williams, 1 Pick. 288.
Kendall v. Samson, 12 Vt. 515.
Smith v. Stern, 17 Pa. St. 360.
Cruikshank v. Cogswell, 26 Ill. 366.
Gilbert v. Decker, 53 Conn. 401.

A simple creditor is not in a position to attack a sale of goods by his debtor on the ground of want of delivery and change of possession; before he can do so he must acquire a lien by attachment, execution, or otherwise before the buyer takes possession.

Clute v Steele, 6 Nev. 335.
Cruikshank v. Cogswell, 26 Ill. 366.
Union Trust Co. v Trumbull, 137 Ill. 146, 180.
Price v. Heubler, 63 Conn. 374.

There must be a *bona fide*, substantial change of possession. A concurrent possession by the seller and buyer, where the seller appears to occupy the same relation to the goods as he did before is deemed colorable and fraudulent (*a*). So, also, if the possession of the buyer be but temporary (*b*) and followed by a return of the goods to the seller (*c*).

(*a*) Babb v. Clemson, 10 S. & R. 419, 427.
Brawn v. Keller, 43 Pa. St. 104.
McKibbin v. Martin, 64 Pa. St. p. 359.
Claflin v. Rosenberg, 42 Mo. 450.
Allen v. Massey, 17 Wal. 351.
Lang v. Stockwell, 55 N.H. 561.
Plaisted v. Holmes, 58 N.H. 293.
Mead v. Noyes, 44 Conn. 487.
Weeks v. Prescott, 53 Vt. 57.
Wheeler v. Selden, 63 Vt. 429.
Gillette v. Stoddart, 30 Ill. App. 231.
Martin v. Duncan, 156 Ill. 274.

(*b*) See White v. O'Brien, 61 Conn. 34.
Brown v. Riley. 22 Ill. 45.
Cunningham v. Hamilton, 25 Ill. 228.

(*c*) Young v. M'Clure, 2 W. & S. 147.
M'Bride v. M'Clelland, 6 W. & S. 94.
Miller v. Garman, 69 Pa. St. 134.
Garman v. Cooper, 72 Pa. St. 32.

Bodenhammer v. Newsom, 5 Jones L. 107.
Webster v. Peck, 31 Conn. 495.
Hatstat v. Blakeslee, 41 Conn. 301.
Allen v. Carr, 85 Ill. 388.
Pickard v. Hopkins, 17 Ill. App. 570.
McMahill v. Humes, 21 Ill. App. 513.
Eagle v. Rohrheimer, 21 Ill. App. 518.
Wood v. Loomis, 21 Ill. App. 604.

Where the subject of the sale is the undivided interest of a joint owner, the rule does not apply, when the party selling is not in the actual possession, for in such case the buyer becomes a tenant in common and the actual possession of his cotenant is constructively his possession.

Brown v. Graham, 24 Ill. 628.
Brown v. O'Neal, 95 Cal. 262.

Where the subject of the sale is not reasonably capable of an actual delivery, then a constructive delivery will be sufficient; as has been held under the circumstances in view of the character and situation of the subject, in the case of the furniture of a large hotel (*a*), a brick kiln (*b*), iron ore on an ore bank (*c*), logs in a stream or piled upon the banks of a stream (*d*), and a growing crop (*e*). In such cases it is only necessary that the buyer should assume the control of the subject so as reasonably to indicate to all concerned the fact of a change of ownership (*f*).

(*a*) McKibbin v. Martin, 64 Pa. St. 352.

(*b*) Piner v. Cover, 55 Ill. 391.

(*c*) Mills v. Camp, 14 Conn. 219.

(*d*) Kingsley v. White, 57 Vt. 565, 568.

(*e*) Thompson v. Wilhite, 81 Ill. 356.
Ticknor v. McClelland, 84 Ill. 471.
Morton v. Ragan, 5 Bush, 334.

(*f*) McKibbin v. Martin, 64 Pa. St. 352.
Cessna v. Nimick, 113 Pa. St. 70.
Ayers v. McCandless, 147 Pa. St. 49.
Straus v. Minzesheimer, 78 Ill. 492.

If the goods are in possession of a bailee notice of the sale to the bailee is all the law requires (*a*). But this does not apply to a mere employee or servant of the seller (*b*).

(*a*) Tuxworth v. Moore, 9 Pick. 347.
Dempsey v. Gardner, 127 Mass. p. 383.
Pierce v. Chipman, 8 Vt. 334.
Lynde v. Melvin, 11 Vt. 683.
Linton v. Butz, 7 Pa. St. 89.
Worman v. Kramer, 73 Pa. St. 385.
Woods v. Hull, 81 * Pa. St. 451.
Hodges v. Hurd, 47 Ill. 363.
Garr v. Hurd, 92 Ill. 315, 325.
Pickard v. Hopkins, 17 Ill. App. p. 572.
Stowe v. Taft, 58 N.H. 445.

(*b*) Flanagan v. Wood, 33 Vt. 332, 338.
Sleeper v. Pollard, 28 Vt. 709.
Trunick v. Smith, 63 Pa. St. 18.

The rule does not apply where the sale is of such a public character as to give notoriety thereto, as a public sale by an officer (*a*), a public sale to a third party under a chattel mortgage after default of the mortgagor (*b*), an assignment for the benefit of creditors duly acknowledged and recorded (*c*), and where the possession of the seller is authorized by a conditional bill of sale or chattel mortgage duly acknowledged and recorded (*d*).

(*a*) Gates v. Gaines, 10 Vt. 346, 351.
Perry v. Foster, 3 Harrington (Del.) 293.
Myers v. Harvey, 2 Pen. & W. 478.
Maynes v. Atwater, 88 Pa. St. 496.
Stoddart v. Price, 143 Pa. St. 537.
Powers v. Green, 14 Ill. p. 389.

(*b*) Hanford v. Obrecht, 49 Ill. 146, 150.

(*c*) Vernon v. Morton, 8 Dana, 247, 253.
Osborne v. Tuller, 14 Conn. 529, 541.
Lowe v. Matson, 140 Ill. 108, 114.

(*d*) Thornton v. Davenport, 1 Scam. 296.
Reed v. Eames, 19 Ill. 594, 596.
Thompson v. Yeck, 21 Ill. 73, 74.

In most of the states the retention by the seller of the possession of the goods is only *prima facie* evidence of fraud, as against creditors.

See Martindale v. Booth, 3 B. & Ad. 498.
Blaut v. Gabler, 77 N.Y. p. 463.
Kane v. Drake, 27 Ind. p. 32.
Warner v. Norton, 20 How. p. 459.
Mead v. Gardiner, 13 R.I. p. 259.

Rule 28.—(B.) WHERE A PERSON HAVING BOUGHT OR AGREED TO BUY GOODS OBTAINS, WITH THE CONSENT OF THE SELLER (1), POSSESSION OF THE GOODS, OR OF THE DOCUMENTS OF TITLE TO THE GOODS (2), THE DELIVERY OR TRANSFER BY THAT PERSON OF THE GOODS OR DOCUMENTS OF TITLE, UNDER ANY SALE, PLEDGE, OR OTHER DISPOSITION THEREOF FOR VALUE, TO ANY PERSON RECEIVING THE SAME IN GOOD FAITH AND WITHOUT NOTICE OF ANY LIEN OR OTHER RIGHT OF THE ORIGINAL SELLER IN RESPECT OF THE GOODS, WILL HAVE THE SAME EFFECT AS TO SUCH RECEIVER AS THOUGH THERE WERE NO SUCH LIEN OR OTHER RIGHT (3).

1. The rule does not apply where the possession is furtively obtained and held without the consent

of the seller. Thus where goods were sold upon credit, the condition precedent to the delivery of the goods being that the buyer should execute his promissory note for the price with approved security, and the buyer furtively takes the goods without complying with the conditions of the sale and sells them to a third person, such third person, although a *bona fide* purchaser without notice of the wrongful taking, can acquire no better title to the goods than his vendor possessed.

Gibbs v. Jones, 46 Ill. 319.
Fawcett v. Osborn, 32 Ill. 411.
See also Brower v. Peabody, 13 N.Y. 121.
Kinsey v. Leggett, 71 N.Y. 387.

2. A transfer of a bill of lading, or in several of the states a warehouse receipt, accompanied by a sale or pledge of the goods specified in the bill, or receipt, will have the same effect as the delivery of the goods themselves to the transferee.

See r 28 (A), n 1.

3. This is the rule at common law, in Illinois (*a*) and Pennsylvania (*b*), and by statute in England (*c*) and several of the states (*d*).

(*a*) Brundage v. Camp, 21 Ill. 330, 336.
M.C. R.R. Co. v. Phillips, 60 Ill. 190, 194.
W.U. R.R. Co. v. Wagner, 65 Ill. 197.
Young v. Bradley, 68 Ill. 553.
Fifield v. Bank, 148 Ill. 163.

(*b*) Statdfeld v. Huntsman, 92 Pa. St. 53.
Dearborn v. Raysor, 132 Pa. St. 231.

(*c*) Sale of Goods Act, 1893, sec. 25 (2).
Lee v. Butler, (1893) 2 Q.B. 318.
Helby v. Matthews, (1894) 2 Q.B. 262.

(*d*) **For a list of the states that have some statutory regulations see 57 Conn. 415.**

Rule 28.—(C.) *EXPLANATION:* THE PERSON IN POSSESSION OF GOODS AS THE OSTENSIBLE OWNER THEREOF UNDER EITHER OF THE LAST TWO RULES (1) WILL BE DEEMED TO BE THE REAL OWNER OF THE GOODS AS TO AN ATTACHING OR EXECUTION CREDITOR WITHOUT NOTICE OF THE PRE-EXISTING RIGHT WHEN HIS DEBT WAS CREATED (2).

1. Under the first of these rules—
   Clow v. Woods, 5 S & R. 275.
   Stephens v. Gifford, 137 Pa. St. 219.
   Lanfear v. Sumner, 17 Mass. 110.
   Shumway v. Rutter, 7 Pick. 56.
   Burge v. Cone, 6 Allen, 413.
   Dempsey v. Gardner, 127 Mass. 381.
   Cobb v. Haskell, 14 Me. 303.
   Reed v. Reed, 70 Me. 504.
   Burnell v. Robertson, 5 Gilm. 282.
   Lewis v. Swift, 54 Ill. 436.
   Ticknor v. McClelland, 84 Ill. 471.
   Allen v. Carr, 85 Ill. 388.
   Curran v. Bernard, 6 Ill. App. 341.
   Huschle v. Morris, 131 Ill. 587.
   Cutting v. Jackson, 56 N.H. 253.
   Hull v. Sigsworth, 48 Conn. 258.
   Weeks v. Prescott, 53 Vt. 57.

   Under the second—
   Van Duzor v. Allen, 90 Ill. 499, 502.
   Hadfield v. Berry, 28 Ill. App. 376, 381.
   Chickering v. Bastress, 130 Ill. 206.

Peöria Mfg. Co. v. Lyons, 153 Ill. 427.
Brunswick v. Hoover, 95 Pa. St. 508.
Farquhar v. McAlevy, 142 Pa. St. 233.

2. Ludwig v. Fuller, 17 Me. 162, 166.
Ketchum v. Watson, 24 Ill. 592.
Howell v. Fisk, 52 Ill. App. 310.
Vanmeter v. Estill, 78 Ky. 456.
Gerow v. Costello, 11 Colo. 560.
Jones v. Clark (Colo. 1894), 38 Pac. Rep. 371.

Rule 29.—(A.) A WRIT OF ATTACHMENT LEVIED UPON GOODS, WHEN FOLLOWED BY A JUDGMENT, WILL BIND THE PROPERTY IN THE GOODS OF THE ATTACHMENT DEBTOR AS FROM THE TIME WHEN THE WRIT IS LEVIED UPON THE GOODS (1).

(B.) A WRIT OF EXECUTION AGAINST GOODS WILL BIND THE PROPERTY IN THE GOODS OF THE EXECUTION DEBTOR AS FROM THE TIME WHEN THE WRIT IS DELIVERED TO THE SHERIFF TO BE EXECUTED; AND, FOR THE BETTER MANIFESTATION OF SUCH TIME, THE SHERIFF OR OTHER OFFICER IS REQUIRED, UPON THE RECEIPT OF ANY SUCH WRIT, TO ENDORSE UPON THE BACK THEREOF THE HOUR, DAY, MONTH, AND YEAR WHEN HE RECEIVED THE SAME (2).

1. Van Loan v. Kline, 10 Johns. 129.
Martin v. Dryden, 1 Gilm. p. 213.
People v. Cameron, 2 Gilm. 468.
Pearl v. Wellman, 3 Gilm. 311.
Chittenden v. Rogers, 42 Ill. 95.
Hannahs v. Felt, 15 Iowa, 143.
Woolfolk v. Ingram, 53 Ala. 13.

2. This is the rule in Illinois and most of the states.

Rev. St. Ill. Ch. 77, §9; Ch. 79, §§87, 88.
People v. Bradley, 17 Ill. 485, 486.
Leach v. Pine, 41 Ill. 65.
Everingham v. Bank, 124 Ill. 527, 535.
Hanchett v. Ives, 133 Ill. 332, 336.
Haggerty v. Wilber, 16 Johns. 287.
Duncan v. M'Cumber, 10 Watts, 212.
Wilson's Appeal, 90 Pa. St. p. 373.

CHAPTER IV.

PERFORMANCE OF THE CONTRACT.

Rule 30.—IT IS THE DUTY OF THE SELLER TO DELIVER (1) THE GOODS, AND OF THE BUYER TO ACCEPT AND PAY FOR THEM, IN ACCORDANCE WITH THE TERMS OF THE CONTRACT OF SALE (2)

1. "Delivery" means voluntary transfer of possession from one person to another. It may be actual or constructive. "In all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he himself held immediately before that act."

Pollock on Possession, p. 46.

2. In every contract of sale there is involved a contract on the one side to deliver, and on the other to accept (*a*).

Thus, if A sells to B goods in the possession of C, it is a part of the contract that when B goes for the goods he shall have them. But the general obligation to deliver may be modified by the terms of the contract; *e.g.*, by a condition that B shall pay to C his charges on the goods (*b*), or that B shall hand over to C the order for the goods (*c*).

(*a*) Buddle v. Green, 3 H. &. N. p. 907.
Gray v. Walton, 107 N.Y. p. 258.
Haskins v. Warren, 115 Mass. p. 533.

(*b*) Buddle v. Green, 3 H. &. N. 906.

(*c*) Bartlett v. Holmes, 13 C.B. 630.

Rule 31.—UNLESS OTHERWISE AGREED (1), DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE ARE CONCURRENT CONDITIONS; THAT IS TO SAY, THE SELLER MUST BE READY AND WILLING TO GIVE POSSESSION OF THE GOODS TO THE BUYER IN EXCHANGE FOR THE PRICE, AND THE BUYER MUST BE READY AND WILLING TO PAY THE PRICE IN EXCHANGE FOR POSSESSION OF THE GOODS (2).

1. The buyer may agree to pay on a fixed day, irrespective of delivery (*a*); or the seller may agree to deliver irrespective of payment, as in the ordinary case of a sale on credit (*b*).

(*a*) Dunlop v. Grote, 2 C. & K. 153.

(*b*) Staunton v. Wood, 16 Q.B. 638.
Kahn v. Cook, 22 Ill. App. 562.

2. Marton v. Lamb, 7 T.R. 125.
Rawson v. Johnson, 1 East, 203.
Porter v. Rose, 12 Johns. 209.
Coonley v. Anderson, 1 Hill, 519.
Tipton v. Feitner, 20 N.Y. 425.
Dana v. King, 2 Pick. 155.
Hapgood v. Shaw, 105 Mass. 279.
Robison v. Tyson, 46 Pa. St. 286.
Hough v. Rawson, 17 Ill. 588.
Funk v. Hough, 29 Ill. 145.
Lassen v. Mitchell, 41 Ill. 101.
Metz v. Albrecht, 52 Ill. 491.
Kitzinger v. Sanborn, 70 Ill. 146.
Barrow v. Window, 71 Ill. 214.
Stoolfire v. Royse, 71 Ill. 223.
Sanborn v. Benedict, 78 Ill. 309.
Simmons v. Green, 35 Ohio St. 104.
Phelps v. Hubbard, 51 Vt. 489.

An averment that the plaintiff was "ready and willing" means that the non-completion of the contract was not the fault of the plaintiff, and that he was disposed and able to complete it.

Cort v. Ry. Co. 17 Q.B. p. 144.

Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word "tender," as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied

with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness.

Smith v. Lewis, 26 Conn. 119.
Clark v. Weis, 87 Ill. p. 441.
Jackson v. Allaway, 6 M. & Gr. 942.
And see Florence Mining Co. v. Brown, 124 U.S. p. 389.

If the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods.

Palmer v. Hand, 13 Johns, 434.
Leven v. Smith, 1 Denio, 573.
Harris v. Smith, 3 S. & R. 20.
Henderson v. Lauck, 21 Pa. St. 359.
Godts v. Rose, 17 C.B. 229, 237.
Adams v. O'Connor, 100 Mass. 515.
Mathews v. Cowan, 59 Ill. 341, 347.
Allen v. Hartfield, 76 Ill. 358.
Owens v. Weedman, 82 Ill. 409.
Canadian Bank v. McCrea, 106 Ill. 281, 298.
Ames v. Moir, 130 Ill. 582, 591.
Paul v. Reed, 52 N.H. 136, 137.
Wabash Elevator Co. v. Bank, 23 Ohio St. 311, 320.

And an attempted payment by a draft or check which upon due presentment is dishonored is no payment.

Mathews v. Cowan, 59 Ill. 341, 347.
Canadian Bank v. McCrea, 106 Ill. 281.
Peoria, etc., Ry. Co. v. Buckley, 114 Ill. 337.
Weddigen v. Fabric Co. 100 Mass. 422.
Hodgson v. Barrett, 33 Ohio St. 63.

And see Brown v. Leckie, 43 Ill. 501.
Woodburn v. Woodburn, 115 Ill. 430.
Nat. Bank v. R.R. Co. 44 Minn. 231.

As to waiver of the condition of immediate payment see:

Bowen v. Burk, 13 Pa. St. 146.
Mackaness v. Long, 85 Pa. St. 158.
Smith v. Lynes, 5 N.Y. 41.
Hammett v. Linneman, 48 N.Y. 399.
Parker v. Baxter, 86 N.Y. 586.
Empire, etc., Co. v. Grant, 114 N.Y. 40.
Upton v. Cotton Mills, 111 Mass. 446.
Freeman v. Nichols, 116 Mass. 309.
Fishback v. Van Dusen, 33 Minn. 111.

Rule 32.—(A.) WHETHER IT IS FOR THE BUYER TO TAKE POSSESSION OF THE GOODS OR FOR THE SELLER TO SEND THEM TO THE BUYER, IS A QUESTION DEPENDING IN EACH CASE ON THE CONTRACT, EXPRESS OR IMPLIED, BETWEEN THE PARTIES (1). APART FROM ANY SUCH CONTRACT, EXPRESS OR IMPLIED, THE PLACE OF DELIVERY IS THE SELLER'S PLACE OF BUSINESS (2), IF HE HAVE ONE, AND IF NOT, HIS RESIDENCE (3): PROVIDED THAT, IF THE CONTRACT BE FOR THE SALE OF SPECIFIC GOODS, WHICH TO THE KNOWLEDGE OF THE PARTIES WHEN THE CONTRACT IS MADE ARE IN SOME OTHER PLACE, THEN THAT PLACE IS THE PLACE OF DELIVERY (4).

1. See Devine v. Edwards, 101 Ill. 138.
   McLaughlin v. Marston, 78 Wis. 670.

2. If no place of delivery is specified in the contract of sale the general rule is, that the goods

are to be delivered at the place where they are at the time the contract is made (*a*), or in the case of goods to be manufactured at the place of manufacture (*b*). Accordingly the store of the merchant, the shop of the manufacturer, or the farm of the farmer, at which the goods sold are deposited or kept, is the place of delivery when neither the language of the contract nor the circumstances of the case show that a different place was intended. This is a rule of construction predicated upon the presumed understanding of the parties when making the contract (*c*).

(*a*) Hatch v. Oil Co. 100 U.S. 134.
Bosworth v. Frankberger, 15 Ill. 508.
Edwards v. Hartt, 66 Ill. 71.
Gray v. Walton, 107 N.Y. 254.
Perlman v. Sartorius, 162 Pa, St. p. 323.

(*b*) Middlesex Co. v. Osgood, 4 Gray, 449.
Goddard v. Binney, 115 Mass. 456.
Ragland v. Wood, 71 Ala. 150.

(*c*) Lobdell v. Hopkins, 5 Cowen, 516.
Rice v. Churchill, 2 Denio, 145.
Hamilton v. Calhoun, 2 Watts, 139.
Kraft v. Hurtz, 11 Mo. 109.
Miles v. Roberts, 34 N.H. p. 254.
Janney v. Sleeper, 30 Minn. 473, 474.
Hillestad v. Hostetter, 46 Minn. 393.

But a different understanding as to the place of delivery may be inferred from the nature of the goods, the usage of the trade, the previous course of dealing between the parties, or some other attendant circumstance (*a*).

Thus, where a quantity of corn was sold to a miller and a part of the corn was delivered at his mill, it was held in a suit for non-delivery of the residue, that the mill was contemplated by the

parties as the place of delivery (*b*). Whatever may be thus reasonably inferred is regarded as if it was expressed in the contract itself.

(*a*) Hatch v. Oil Co. 100 U.S. p. 134-5.

(*b*) Field v. Runk, 22 N.J.L. 525, 529.
Bronson v. Gleason, 7 Barb. 472.
Bacon v. Cobb, 45 Ill. 47, 50.

3. See Wilmouth v. Patton, 2 Bibb, 280.
Sousely v. Burns, 10 Bush, 87.
Woods v. Dial, 12 Ill. p. 73.

4. So held where a lot of cattle were being fed in another man's field at the time the contract was made.

Smith v. Gillett, 50 Ill. 290.
See also Buddle v. Green, 3 H. & N. 906, 907.
Wood v. Tassell, 6 Q.B. 234.
McPherson v. Gale, 40 Ill. 368.
McPherson v. Hall, 44 Ill. 264.
Dakota Stock Co. v. Price, 22 Neb. 96, 106.

A contract to deliver goods at a place to be designated by the buyer is satisfied by having the goods ready for delivery at the place where they are manufactured or kept, if the buyer, upon due notice thereof, does not designate the place.

Lucas v. Nichols, 5 Gray, 309.
Hunter v. Wetsell, 84 N.Y. 549.

In Illinois it is provided by statute that "when any note, bond, bill, or other instrument in writing is for the payment or delivery of personal property other than money, and no particular place is specified therein for such payment or delivery, the maker may tender such personal property on the day of payment or delivery, at the

place where the obligee or payee resided or had his place of business at the time of the execution of the instrument. If such personal property is too ponderous to be easily moved, or the obligee or payee had not, at the time of the execution of such instrument, a known place of residence or business in the county where the maker resided, or had his place of business, then tender may be made at the place where the maker resided or had his place of business at the time of the execution of the instrument."

Rev. St. Ill. Ch. 135, § 1.

As to the place of delivery (in the absence of a statute) where a note is payable in goods on a certain future day see:

Goodwin v. Holbrook, 4 Wend. 377, 380.
Vance v. Bloomer, 20 Wend. p. 198.
Barr v. Myers, 3 W. & S. 295.
Allen v. Woods, 24 Pa. St. 76.

Rule 32.—(B.) WHERE UNDER THE CONTRACT OF SALE THE SELLER IS BOUND TO SEND THE GOODS TO THE BUYER, BUT NO TIME FOR SENDING THEM IS FIXED, THE SELLER IS BOUND TO SEND THEM WITHIN A REASONABLE TIME.

Ellis v. Thompson, 3 M. & W. 445, 446.
Cocker v. Mfg. Co. 3 Sumner, 530.
Henkle v. Smith, 21 Ill. 237.
Kribs v. Jones, 44 Md. 396.
Boyd v. Gunnison, 14 W Va. 1.
Dennis v. Stoughton, 55 Vt. 376.
Pope v. Car Co. 107 N.Y. 61.

Where the goods are to be delivered at a future time to be designated by the buyer and the buyer

does not do so, it is sufficient if the seller is ready to send them.

Sanborn v. Benedict, 78 Ill. 309.
Louisville, etc., Ry. Co. v. Iron Co. 126 Ill. 294.
Posey v. Scales, 55 Ind. 282.

Where the time for delivery is not fixed, and the place of delivery is elsewhere than at the buyer's residence or place of business the seller should notify the buyer of the delivery, or his readiness to deliver.

Henkle v. Smith, 21 Ill. 238.
Rogers v. Van Hoesen, 12 Johns, 221.
Cullum v. Wagstaff, 48 Pa. St. 300.

In a contract for the sale and delivery of goods "free on board ship," the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made (*a*); but, where, by the nature or the express provisions of the contract, either the time or the place of delivery is at the seller's option, the seller becomes the first actor, and it is his duty to give notice of the time or place of delivery before there is any obligation upon the buyer to name the ship (*b*).

(*a*) Armitage v. Insole, 14 Q.B. 728.
Walton v. Black, 5 Houston, 149.
See also Kunkle v. Mitchell, 56 Pa. St. 100.
Hocking v. Hamilton, 158 Pa. St. 107.
Bolton v. Riddle, 35 Mich. 13.
Smith Bros. v. Wheeler, 7 Oregon, 49.

(*b*) Dwight v. Eckert, 117 Pa. St. 490.

Rule 32.—(C.) THE DELIVERY OF THE KEY OF THE PLACE WHERE THE GOODS ARE MAY, BY AGREEMENT, OPERATE AS A DELIVERY OF THE GOODS.

It has been repeatedly held that the delivery of the key of a building, in which goods are stored, by the seller to the buyer, with intent to surrender possession of the goods (*a*), is a sufficient delivery as against a subsequent attaching or execution creditor of the seller (*b*).

(*a*) See Milgate v. Kebble, 3 M. & Gr. 100.

(*b*) Packard v. Dunsmore, 11 Cush. 282.
Wilkes v. Ferris, 5 Johns. 335.
Barr v. Reitz, 53 Pa. St. 256.
Benford v. Schell, 55 Pa. St. 393.
Powers v. Green, 14 Ill. p. 389.
Vining v. Gilbreth, 39 Me. 496.
Conly v. Friedman (Colo. App. 1895), 40 Pac. Rep. 348.

"The delivery of a key giving exclusive control is regarded as delivery of possession itself."

Hilton v. Tucker, 39 Ch. D. p. 676.

"When a ship is abroad, a perfect transfer of the ship may, at the common law, be made by assignment of the bill of sale, and delivery of that and the other documents relating to the ship, just as the delivery of the key of a warehouse to the buyer of goods contained therein is held to change the property of the goods, the delivery in such a case being not merely a symbol, but the mode of enabling the buyer to take actual possession as soon as the circumstances will permit."

Crapo v. Kelly, 16 Wal. p. 640.

Rule 32.—(D.) WHERE THE GOODS AT THE TIME OF SALE ARE IN THE POSSESSION OF A BAILEE, THERE IS NO DELIVERY BY SELLER TO BUYER UNLESS AND UNTIL THE BAILEE IS NOTIFIED OF THE SALE (1).

QUALIFICATION: THE WANT OF SUCH NOTICE WILL NOT AFFECT THE OPERATION OF THE ISSUE OR TRANSFER OF ANY DOCUMENT OF TITLE TO GOODS (2).

1. Carter v. Willard, 19 Pick. 1.
Burge v. Cone, 6 Allen, 412.
Dempsey v. Gardner, 127 Mass. p. 383.
Hodges v. Hurd, 47 Ill. 363.
Gaar v. Hurd, 92 Ill. 315.
Linton v. Butz, 7 Pa. St. 89.
Worman v. Kramer, 73 Pa. St. 385.
Woods v. Hull, 81* Pa. St. 451.
Boswell v. Green, 25 N.J.L. 390.
Hildreth v. Fitts, 53 Vt. 684.
Freiberg v. Steenbock, 54 Minn. 509.

When the bailee of goods is informed of the sale thereof, he becomes keeper for the true owner by operation of law, and his consent is immaterial. It would be unreasonable to allow the bailee of goods to prevent the owner from making a valid sale as against all persons, by refusing to agree to surrender it to the buyer after the termination of his own right of possession. The object of requiring a change of possession to accompany a sale of goods, is to give notice to the public, and when goods in the custody of a bailee are sold, this object is as much accomplished by notifying the bailee of the sale and directing him to hold

for the buyer, as it would be by his express promise thus to hold. The fact of sale would be learned by inquiry from the bailee in one case as well as the other.

Hodges v. Hurd, 47 Ill. p. 364.
Nat. Bank v. I. & B. Works, 46 Ill. App. 526.
Pierce v. Chipman, 8 Vt. p. 338.
Carter v. Willard, 19 Pick. p. 10.
Russell v. O'Brien, 127 Mass. p. 354.
Buhl Iron Works v. Teuton, 67 Mich. p. 631.

This rule as to change of possession upon notice to the bailee does not apply where the goods are in the custody of a mere servant; for in such case his possession is merely the possession of his employer.

Flanagan v. Wood, 33 Vt. 332, 338.
Sleeper v. Pollard, 28 Vt. 709.
Trunick v. Smith, 63 Pa. St. 18.
Watkins v. Petefish, 49 Ill. App. 80.

2. Barber v. Meyerstein, 4 H.L. 317.
Gibson v. Stevens, 8 How. 384.
The Thames, 14 Wal. 98.
Taylor v. Turner, 87 Ill. 296.
Farmers' Bank v. Logan, 74 N.Y. 568.
Forbes v. R.R. Co. 133 Mass. 154.

Rule 32.—(E.) DEMAND OR TENDER OF DELIVERY MAY BE TREATED AS INEFFECTUAL UNLESS MADE AT A REASONABLE HOUR.

See Startup v. Macdonald, 6 M. & Gr. 593, 624.
Berry v. Nall, 54 Ala. 446, 454.
Croninger v. Crocker, 62 N.Y. 151, 158.

Rule 32.—(F.) UNLESS OTHERWISE AGREED, THE EXPENSES OF AND INCIDENTAL TO PUTTING THE GOODS INTO A DELIVERABLE STATE MUST BE BORNE BY THE SELLER.

Cole v. Kerr, 20 Vt. 21.

Rule 33.—(A.) WHERE THE SELLER DELIVERS TO THE BUYER A QUANTITY OF GOODS LESS THAN HE CONTRACTED TO SELL, THE BUYER MAY REJECT THEM (1), BUT IF THE BUYER ACCEPTS THE GOODS SO DELIVERED HE MUST PAY FOR THEM AT THE CONTRACT RATE (2); SUBJECT, HOWEVER, TO A DEDUCTION OF THE DAMAGES (IF ANY) HE HAS SUSTAINED FROM THE NON-FULFILLMENT OF THE CONTRACT (3).

1. Bruce v. Pearson, 3 Johns. 534.
   Hill v. Heller, 27 Hun, 416.
   Rochester Oil Co. v. Hughey, 56 Pa. St. 322.
   Rockford, etc. R.R. Co. v. Lent, 63 Ill. 288.
   Smith v. Lewis, 40 Ind. 98.
   Salmon v. Boykin, 66 Md. 541.

2. Oxendale v. Wetherell, 9 B. & C. 386.
   Colonial Ins. Co. v. Ins. Co. 12 App. Cas. p. 138.
   Morgan v. Gath, 3 H. & C. 748.
   Downs v. Marsh, 29 Conn. 409.
   Evans v. R.R. Co. 26 Ill. 189.
   Dwyer v. Duquid, 70 Ill. 307.
   Defenbaugh v. Weaver, 87 Ill. 132.
   Polhemus v. Heiman, 45 Cal. 573.
   Avery v. Willson, 81 N.Y. 341.
   Brady v. Cassidy, 145 N.Y. 171.
   Churchill v. Holton, 38 Minn. 519.

3. **It is a rule supported by the weight of modern authority, that, if the buyer of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the seller has refused to deliver the residue, there is a severance of the entirety of the contract, and the buyer becomes liable to the seller for the price of such part; but he may reduce the seller's claim by showing that he has sustained damage by the seller's failure to fulfill his contract.**

Richards v. Shaw, 67 Ill. 222, 224.
Shaw v. Badger, 12 S. & R. 275.
Bowker v. Hoyt, 18 Pick. 555.
Hedden v. Roberts, 134 Mass. 38.
Clark v. Moore, 3 Mich. pp. 58-60.
Harralson v. Stein, 50 Ala. 347.
Flanders v. Putney, 58 N.H. 358.

On general principles, either party to a contract, whether entire or severable, may recover, as on an implied agreement, for a partial performance, which has been voluntarily accepted by the other, with full knowledge of the breach; subject, however, to the right of the latter to recoup for the failure to fully perform the express contract. But if both parties are alike in default, neither can maintain an action on the contract for its breach by the other.

Thus a buyer who has accepted goods delivered under an express contract, but not at the times or in the quantity required thereby, with knowledge of the seller's default, cannot maintain an action against him for his breach of contract, where without any legal excuse he has himself failed to pay for the goods as delivered.

Harber Bros. Co. v. Cycle Co. 151 Ill. 84, 96.

Rule 33.—(B.) WHERE THE SELLER DELIVERS TO THE BUYER A QUANTITY OF GOODS LARGER THAN HE CONTRACTED TO SELL, THE BUYER MAY ACCEPT THE GOODS INCLUDED IN THE CONTRACT AND REJECT THE REST (1), OR HE MAY REJECT THE WHOLE (2). IF THE BUYER ACCEPTS THE WHOLE OF THE GOODS SO DELIVERED HE MUST PAY FOR THEM AT THE CONTRACT RATE (3).

1. Larkin v. Lumber Co. 42 Mich. 296.

2. Hart v. Mills, 15 M. & W. 85, 87.
Cunliffe v. Harrison, 6 Exch. 903.
Downer v. Thompson, 2 Hill 137; S.C. 6 Hill 208.
Barton v. Kane, 17 Wis. 37, 43.
Stevenson v. Burgin, 49 Pa. St. 36.
Rommel v. Wingate, 103 Mass. 327.

As a general rule the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed on, and the seller has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered.

Perry v. Iron Co. 16 R.I. 318, 319.

The rule does not apply where by the mutual understanding of the parties or a well known usage the buyer is to take the proper quantity from goods of the kind in bulk at the place of delivery.

Lockhart v. Bonsall, 77 Pa. St. 53, 60.
Brownfield v. Johnson, 128 Pa. St. 254, 267.
Iron Cliffs Co. v. Buhl, 42 Mich. 86, 89.

3. **When the seller delivers a larger quantity of goods than was ordered, such delivery operates as a proposal for a new contract.**

Cunliffe v. Harrison, 6 Exch. p. 906.

Rule 33.—(C.) WHERE THE SELLER DELIVERS TO THE BUYER THE GOODS HE CONTRACTED TO SELL MIXED WITH GOODS OF A DIFFERENT DESCRIPTION NOT INCLUDED IN THE CONTRACT, THE BUYER MAY ACCEPT THE GOODS WHICH ARE IN ACCORDANCE WITH THE CONTRACT AND REJECT THE REST (1), OR HE MAY REJECT THE WHOLE (2).

1. Cohen v. Pemberton, 53 Conn. 221.
And see Rodman v. Guilford, 112 Mass. 405.

2. Levy v. Green, 1 E. & E. 969.
Rylands v. Kreitman, 19 C.B.N.S. 351.
Clark v. Baker, 11 Met. 186.
Croninger v. Crocker, 62 N.Y. 151, 157.
Hoffman v. King, 58 Wis. 314.
Walker v. Davis, 65 N.H. 170.

Such qualifying words as "about" or "more or less" may be used in the statement of the quantity of goods to be delivered. For such cases the following rules have been laid down:

1. Where the contract identifies the goods by reference to independent circumstances, *e.g.*, all the goods deposited in a certain warehouse, or to be shipped in a certain vessel, the mention of an amount accompanied by such qualifying words is regarded as a mere estimate, as to which good faith is all that is required (*a*).

2. Where the goods cannot be so identified, the amount named is material and such qualifying words provide only for some deviation within reasonable limits (*b*).

3. Where the qualifying words are supplemented by some other stipulation or condition giving them a broader scope, *e.g.*, so much as the buyer may require, or as the seller may be able to furnish, then the contract is to be governed by such added stipulation or condition in the absence of fraud or intentional deception (*c*).

(*a*) Brawley v. United States, 96 U.S. p. 171.
Pembroke Iron Co. v. Parsons, 5 Gray, 589.
Day v. Cross, 59 Tex. 595.
Morris v. Wibaux, 47 Ill. App. 630.

(*b*) Cabot v. Windsor, 1 Allen, 546, 550.
Low v. Freeman, 12 Ill. 469.
Tilden v. Rosenthal, 41 Ill. 385.
Creighton v. Comstock, 27 Ohio St. 548.
Holland v. Rea, 48 Mich. 218, 221.
Norrington v. Wright, 115 U.S. 188, 204.

(*c*) Brawley v. United States, 96 U.S. 168, 172.
Gwillim v. Daniell, 2 Cromp. M. & R. 61, 71.
McConnel v. Murphy, L.R. 5 P.C. 203, 217.
Thurber v. Ryan, 12 Kan. 453.
Callmeyer v. Mayor, 83 N.Y. 116.

Rule 33.—(D.) *QUALIFICATION:* THESE RULES AS TO DELIVERY OF WRONG QUANTITY ARE SUBJECT TO ANY BINDING USAGE OF TRADE, SPECIAL AGREEMENT, OR COURSE OF DEALING BETWEEN THE PARTIES.

See r 58.

Rule 34.—(A.) UNLESS OTHERWISE AGREED (1), THE BUYER OF GOODS IS NOT BOUND TO ACCEPT DELIVERY THEREOF BY INSTALMENTS (2).

1. An agreement for delivery by instalments may be implied. In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the nature of the case, be delivered at one time, as, for instance, in the case of a contract for the supply of provisions for the army, or any large establishment.

Colonial Ins. Co. v. Ins. Co. 12 App. Cas. p. 138.

2. Reuter v. Sala, 4 C.P.D. 239.

If a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement by shipping part of that amount at the time appointed and the rest from time to time afterwards; and the buyer is not bound to accept any part of the iron so shipped.

Cleveland Rolling Mill Co. v. Rhodes, 121 U.S. 255, 261.
And see r 9, n 4.

Rule 34.—(B.) WHERE THERE IS A CONTRACT FOR THE SALE OF GOODS TO BE DELIVERED BY STATED INSTALMENTS, WHICH ARE TO BE SEPARATELY PAID FOR (1), AND THE SELLER MAKES DEFECTIVE DELIVERIES IN RESPECT OF ONE OR MORE INSTALMENTS (2), OR THE BUYER FAILS TO TAKE DELIVERY OF (3), OR REFUSES TO PAY FOR (4), ONE OR MORE INSTALMENTS, THE BREACH OF CONTRACT, UNLESS EXCUSED OR WAIVED (5), PRIMA FACIE ENTITLES THE OTHER PARTY TO TREAT THE WHOLE CONTRACT AS REPUDIATED.

1. See Nightingale v. Eiseman, 121 N.Y. 288.

2. That default in the delivery of an early instalment of goods entitles the buyer to refuse subsequent instalments see—

Hoare v. Rennie, 5 H. & N. 19.
King Philip Mills v. Slater, 12 R.I. 82.
Norrington v. Wright, 115 U.S. 188.
Pope v. Porter, 102 N.Y. 366.
Carney v. Newberry, 24 Ill. 203.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be delivered in certain proportions monthly, the seller's failure to deliver the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

Norrington v. Wright, 115 U.S. p. 204.
And see Campbell Mfg. Co. v. Marsh (Colo. 1894), 36 Pac. Rep. 799.

3. In *Honck v. Muller*, 7 Q.B.D. 92, under a contract for the sale of 2,000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded the delivery of one-third in December, and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer's not taking any iron in November. "Suppose" said Bramwell, L.J., "a man orders a suit of clothes, the price being 7*l.*—4*l.* for the coat, 2*l.* for the trousers, and 1*l.* for the waistcoat, can he be made to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first? * * * It has never yet been held that a man may break his contract, render the performance of the whole impossible, and though nothing has been done under it, insist on the performance of the remainder." pp. 99, 100.

And see Higgins v. R.R. Co. 60 N.Y. 553.

4. That a positive refusal to pay for an early instalment of goods relieves the seller from forwarding subsequent instalments see:

Withers v. Reynolds, 2 B. & Ad. 882.
Bloomer v. Bernstein, L.R. 9, C.P. 588.
Bradley v. King, 44 Ill. 339.
Stephenson v. Cady, 117 Mass. 6.
Stokes v. Baars, 18 Fla. 656.

Rugg v. Moore, 110 Pa. St. 236.
Skillman Hardware Co. v. Davis, 53 N.J.L. 144.
Kokomo Co. v. Inman, 134 N.Y. 92.

But unless a different intention appears from the terms of the contract or the circumstances of the case (*a*), a mere omission or failure to pay for an instalment of goods at the proper time where the buyer is desirous and able to complete the contract will not entitle the seller to treat the contract as repudiated (*b*).

(*a*) See r 9, ns 1, 2.

(*b*) Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434.
Norrington v. Wright, 115 U.S. p. 210.
Palm v. R.R. Co. 18 Ill. 217, 221.
County v. Overholt, 18 Ill. 223, 227.
Hime v. Klasey, 9 Ill. App. 166.
Winchester v. Newton, 2 Allen, 492, 494.
Myer v. Wheeler, 65 Iowa, 390, 396.
Hansen v. Steam Heating Co. 73 Iowa, 77.
Otis v. Adams, 56 N.J.L. 39.
Pierson v. Duncan, 162 Pa. St. 187.

If the stipulation as to time of payment is not of sufficient importance to induce the seller to make a demand for payment at the time he delivers or offers the goods, delay in payment ought not to be treated as a sufficient ground for his renouncement of the contract. Acquiescence in the delay of payment may well be regarded as a waiver of payment for the time being, or a consent to the delay during such acquiescence, or until a demand and a refusal to pay.

5. See Bollman v. Burt, 61 Md. 415, 422.
Morgan v. McKee, 77 Pa. St. 231.
Scott v. Coal Co. 89 Pa. St. 231.
Cahen v. Platt, 69 N.Y. 348.
Blackburn v. Reilly, 47 N.J.L. 310.
Clark v. Steel Works, 3 U.S. App. 358.

Rule 35.—(A.) WHERE, IN PURSUANCE OF A CONTRACT OF SALE, THE SELLER IS AUTHORIZED OR REQUIRED TO SEND THE GOODS TO THE BUYER, DELIVERY OF THE GOODS TO A CARRIER, WHETHER NAMED BY THE BUYER OR NOT (1), FOR THE PURPOSE OF TRANSMISSION TO THE BUYER, IS PRIMA FACIE DEEMED TO BE A DELIVERY OF THE GOODS TO THE BUYER (2).

1. Where a particular carrier is named by the buyer, the goods must be delivered to that carrier (*a*). Where no carrier is named, a general order to send implies an order to send in the usual way; *i.e.*, by a common carrier, or the usual carrier in such cases. It is not enough for the seller to forward the goods by any person or persons, but they must be forwarded through the usual channels—channels supposed to be in contemplation of the buyer (*b*).

(*a*) Hills v. Lynch, 3 Robertson, 42.
Wheelhouse v. Parr, 141 Mass. 593.
Iasigi v. Rosenstein, 65 Hun, 591.

And see r 9, n 4.

(*b*) Comstock v. Affoelter, 50 Mo. 411, 412.

2. Dutton v. Solomonson, 3 Bos. & Pul. 582, 584.
Dunlop v. Lambert, 6 Cl. & F. p. 620.
Ex parte Pearson, L.R. 3 Ch. App. 443, 450.
Whiting v. Farrand, 1 Conn. 60.
The Mary and Susan, 1 Wheat. 25.
Halliday v. Hamilton, 11 Wal. 560, 564.
Putnam v. Tillotson, 13 Met. 517, 520.
Merchant v. Chapman, 4 Allen, 362, 364.
Prince v. R.R. Co. 101 Mass. 542, 546.
Schumacher v. Eby, 24 Pa. St. 522, 524.

Bacharach v. Freight Line, 133 Pa. St. 414.
Perlman v. Sartorius, 162 Pa. St. 320.
Diversy v. Kellogg, 44 Ill. 114.
Pike v. Baker, 53 Ill. 163.
Stafford v. Walter, 67 Ill. 83.
Magruder v. Gage, 33 Md. 344, 349.
Farmers' Phosphate Co. v. Gill, 69 Md. 537, 545.
Krulder v. Ellison, 47 N.Y. 36.
Wilcox Plate Co. v. Green, 72 N.Y. 17.
Hobart v. Littlefield, 13 R.I. 341.
Falvey v. Richmond, 87 Ga. 99.
Kelsea v. Mfg. Co. 55 N.J.L. 320.

The rule does not obtain where it appears that the seller undertakes to deliver the goods at the place of their destination. In such case the carrier is the agent of the seller.

Dunlop v. Lambert, 6 Cl. & F. 600, 620.
Suit v. Woodhall, 113 Mass. 391, 394.
Kribs v. Jones, 44 Md. 396, 408.
Devine v. Edwards, 101 Ill. 138.
McLaughlin v. Marston, 78 Wis. 670.
McNeal v. Braun, 53 N.J.L. 617.
Braddock Glass Co. v. Irwin, 153 Pa. St. 440.

The carrier is not the agent of the buyer to accept the goods as corresponding with the executory contract, although he may be his agent to receive and transport them. An examination by the carrier of the quality of the goods would be, in most cases, impracticable.

Pierson v. Crooks, 115 N.Y. 539, 549.
Pope v. Allis, 115 U.S. 363, 372.
Fogel v. Brubaker, 122 Pa. St. 7, 15.
Schwartz v. Church (Minn. 1895), 62 N.W. Rep. 266.
Diversy v. Kellogg, 44 Ill. p. 119.
Johnson v. Cuttle, 105 Mass. 449, 450.
Keiwert v. Meyer, 62 Ind. 593.

Rule 35.—(B.) UNLESS OTHERWISE AUTHORIZED BY THE BUYER, THE SELLER MUST MAKE SUCH CONTRACT WITH THE CARRIER ON BEHALF OF THE BUYER AS MAY BE REASONABLE, HAVING REGARD TO THE NATURE OF THE GOODS AND THE OTHER CIRCUMSTANCES OF THE CASE. IF THE SELLER OMIT SO TO DO, AND THE GOODS ARE LOST OR DAMAGED IN COURSE OF TRANSIT, THE BUYER MAY DECLINE TO TREAT THE DELIVERY TO THE CARRIER AS A DELIVERY TO HIMSELF, OR MAY HOLD THE SELLER RESPONSIBLE IN DAMAGES.

Clarke v. Hutchins, 14 East, 475.
Buckman v. Levi, 3 Camp. 414.

The delivery to a carrier is incomplete to charge the buyer for the price of the goods, if lost, unless the seller, in so delivering them, exercises due care and diligence, so as to provide the buyer with a remedy over against the carrier.

Ward v. Taylor, 56 Ill. 494, 495.

The seller must furnish to the carrier proper directions as to forwarding the goods.

Woodruff v. Noyes, 15 Conn. 335.
Finn v. Clark, 10 Allen, 479; S.C. 12 Allen, 522.
Garretson v. Selby, 37 Iowa, 529.

It is the duty of the seller in shipping goods by a carrier to take the usual and ordinary precautions to insure the goods a safe conveyance.

It would be negligence on his part to ship eggs in a box without any packing to prevent break-

age. So, also, to ship fruit during the freezing season in a common box car when he could have shipped the fruit in a refrigerator car so as to prevent freezing.

Wilson v. Fruit Co. (Ind. App. 1894), 38 N.E. Rep. 827.
See also Davis v. Koenig, 165 Pa. St. 347.

"A merchant is bound to insure for his correspondent, if, from the course of dealing between them, the one has been used to send orders for insurance and the other to obey them."

N.Y. Tartar Co. v. French, 154 Pa. St. 273, 282.

Rule 36.—WHERE THE SELLER OF GOODS ORDERED FROM A DISTANT PLACE SHIPS THEM IN A MERCHANTABLE CONDITION ACCORDING TO THE ORDER, THE BUYER MUST, UNLESS OTHERWISE AGREED, TAKE ANY RISK OF DETERIORATION IN THE GOODS NECESSARILY INCIDENT TO THE COURSE OF TRANSIT.

It was so held where the seller in Staffordshire agreed to manufacture and forward by a canal boat to the buyer in Liverpool hoop-iron, and the same was necessarily subject to rust in that course of transit.

Bull v. Robison, 10 Exch. 342.
Also, Leggat v. Sands, 60 Ill. 158. (Ale shipped by the manufacturer from Chicago to Montana.)
Mann v. Everston, 32 Ind. 355. (Kiln-dried corn-meal shipped by the manufacturer from Indiana to New Orleans.)

Lord v. Edwards, 148 Mass. 476. (Sugars shipped from Manila to New York.)
Gates v. Pkg. Co. 78 Cal. 439. (Fruits shipped from railroad station of grower to that of buyer's canning factory.)
English v. Spokane Com. Co. 15 U.S. App. 218. (Eggs shipped from Omaha to Spokane Falls.)
And see Stafford v. Walter, 67 Ill. 83, 85.

Rule 37.—(A.) WHERE GOODS ARE DELIVERED TO THE BUYER, WHICH HE HAS NOT PREVIOUSLY EXAMINED, HE IS NOT DEEMED TO HAVE ACCEPTED THEM UNLESS AND UNTIL HE HAS HAD A REASONABLE OPPORTUNITY OF EXAMINING THEM FOR THE PURPOSE OF ASCERTAINING WHETHER THEY ARE IN CONFORMITY WITH THE CONTRACT.

Heilbutt v. Hickson, L.R. 7 C.P. p. 456.
Doane v. Dunham, 65 Ill. 512; S.C. 79 Ill. 131.
Underwood v. Wolf, 131 Ill. 425.
Knoblauch v. Kronschnabel, 18 Minn. 300.
Henkel v. Welsh, 41 Mich. 666.
Pope v. Allis, 115 U.S. 363, 372.
Fogel v. Brubaker, 122 Pa. St. 7, 15.
Pierson v. Crooks, 115 N.Y. 539, 551.
McNeal v. Braun, 53 N.J.L. 617, 624.

Where there is a contract for the sale of goods by a particulr description as to kind and aquality, it is a condition precedent to the seller's right to recover of the buyer that the goods which he offers to deliver, or which he has delivered, shall answer such description. In such case there is an implied undertaking on the part of the seller, that

the buyer shall have a fair opportunity to examine the goods.

Shields v. Reibe, 9 Ill. App. 598, 602.

Where goods are bought without previous examination (*a*), or by sample (*b*), the place of delivery is *prima facie* the place for examination.

(*a*) Pease v. Copp, 67 Barb. 132.
Holt v. Pie, 120 Pa. St. 440.
Peace River Phosphate Co. v. Grafflin, 58 Fed. 550.

(*b*) Perkins v. Bell, (1893) 1 Q.B. 193.

The buyer may use a reasonable quantity of the goods in order to enable him to determine whether the material conforms to the contract, where such practical test is necessary and is resorted to for that purpose.

Whiting Co. v. Lead Works, 58 Mich. 29.
Cream City Glass Co. v. Friedlander, 84 Wis. 53.

Rule 37.—(B.) UNLESS OTHERWISE AGREED(1), WHEN THE SELLER TENDERS DELIVERY OF GOODS TO THE BUYER, HE IS BOUND, ON REQUEST, TO AFFORD THE BUYER A REASONABLE OPPORTUNITY OF EXAMINING THE GOODS FOR THE PURPOSE OF ASCERTAINING WHETHER THEY ARE IN CONFORMITY WITH THE CONTRACT.

1. See *Pettitt* v. *Mitchell*, 4 M. & Gr. 819, 838, where by the printed conditions of sale by auction the goods sold as catalogued were to be taken away with all faults and errors of description.

2. Where the goods offered were in closed casks and the buyer was not allowed an opportunity to see whether they were really the goods for which he had bargained, it was held that there was not a valid tender of the goods.

Isherwood v. Whitmore, 11 M. & W. 347.
See also Startup v. Macdonald, 6 M. & Gr. 593, 610.
Avery v. Stewart, 2 Conn. 69, 74.
Croninger v. Crocker, 62 N.Y. 151, 158.
McNeal v. Braun, 53 N.J.L. 617, 624.

Rule 38.—THE BUYER IS DEEMED TO HAVE ACCEPTED THE GOODS WHEN HE INTIMATES TO THE SELLER THAT HE HAS ACCEPTED THEM (1), OR WHEN THE GOODS HAVE BEEN DELIVERED TO HIM, AND HE DOES ANY ACT IN RELATION TO THEM WHICH IS INCONSISTENT WITH THE OWNERSHIP OF THE SELLER (2), OR WHEN, AFTER THE LAPSE OF A REASONABLE TIME, HE RETAINS THE GOODS WITHOUT INTIMATING TO THE SELLER THAT HE HAS REJECTED THEM (3).

1. Saunders v. Topp, 4 Exch. 390.
Gray v. Davis, 10 N.Y. p. 292.
Hayner v. Sherrer, 2 Ill. App. 536.
Eureka Steel Co. v. Crossing Works, 23 Ill. App. 594.

Where a quantity of wheat was bought by sample it was held that a statement by the buyer on delivery of the first load that "it would do," did not conclude him as to the whole purchase, but that he had the right to reject the other loads if they were not equal to the sample.

Hubbard v. George, 49 Ill. 275.

See also Cook v. Brandeis, 3 Met. (Ky.) 555.

2. As where the buyer after the receipt of the goods sells (*a*), or attempts to sell (*b*) all or part of the goods or otherwise treats them as his own (*c*).

(*a*) Chapman v. Morton, 11 M. & W. 534.
Hill v. McDonald, 17 Wis. 97.
Warden v. Marshall, 99 Mass. 305.
Wolf v. Dietzsch, 75 Ill. 205.
Phillips v. Ocmulgee Mills, 55 Ga. 633.
Delamater v. Chappell, 48 Md. 244.

(*b*) Parker v. Palmer, 4 B. & Ald. 387.
Perkins v. Bell, (1893) 1 Q.B. 193.

(*c*) Harnor v. Groves, 15 C.B. 667.
Gray v. Davis, 10 N.Y. 285.
Brown v. Foster, 108 N.Y. 387.
Lyon v. Bertram, 20 How. 149.
Diversy v. Kellogg, 44 Ill. p. 119.
Carondelet Iron Works v. Moore, 78 Ill. 69, 70.
Mayes v. Rogers, 47 Ill. App. 372.
And see Cream City Glass Co. v. Friedlander, 84 Wis 53, 59.

3. Heilbutt v. Hickson, 7 C.P. pp. 451, 452.
Couston v. Chapman, L.R. 2 Sc. App. 250.
Dailey v. Green, 15 Pa. St. 118.
Treadwell v. Reynolds, 39 Conn. 31.
Ellis v. Roche, 73 Ill. 280.
Wolf v. Dietzsch, 75 Ill. 205.
Pennell v. McAfferty, 84 Ill. 364.
Gaff v. Homeyer, 59 Mo. 345.
Watkins v. Paine, 57 Ga. 50.
Mason v. Smith, 130 N.Y. 474.
Hobbs v. Whip Co. 158 Mass. 194.
Foss Brewing Co. v. Bullock, 16 U.S. App. 311.
McClure v. Jefferson, 85 Wis. 208.
See Schwartz v. Church (Minn. 1895), 62 N.W. Rep. 266.

See also r 23, s-rs 4, 5.

And goods may by arrangement be accepted conditionally and the acceptance may in such case be withdrawn on failure of the condition.

Lucy v. Mouflet, 5 H. & N. 229.
Belt v. Stetson, 26 Minn. 411.

Rule 39.—UNLESS OTHERWISE AGREED, WHERE GOODS ARE DELIVERED TO THE BUYER, AND HE REFUSES TO ACCEPT THEM, HAVING THE RIGHT SO TO DO, HE IS NOT BOUND TO RETURN THEM TO THE SELLER, BUT IT IS SUFFICIENT IF HE INTIMATES TO THE SELLER THAT HE REFUSES TO ACCEPT THEM.

Grimoldby v. Wells, L.R. 10 C.P. 391.
Starr v. Torrey, 22 N.J.L. 190, 196.
Spaulding v. Hanscom (N.H. 1893), 32 Atl. Rep. 154.
Alden v. Hart, 161 Mass. 576, 581.

See also r 23, s-r 5, n 3.

The buyer may return the goods, or offer to return them, if not according to contract; but it is sufficient to signify his rejection of them by stating that they are not according to contract, and that they are at the seller's risk. No particular form is essential; it is sufficient if he does any unequivocal act showing that he rejects them.

Grimoldby v. Wells, L.R. 10 C.P. p. 395.

But it seems that the buyer would be liable as an involuntary bailee for the value of the goods, if, while in his custody, they were lost through his gross negligence.

Dailey v. Green, 15 Pa. St. 118, 126.

Rule 40.—WHEN THE SELLER IS READY AND WILLING TO DELIVER THE GOODS, AND REQUESTS THE BUYER TO TAKE DELIVERY, AND THE BUYER DOES NOT WITHIN A REASONABLE TIME AFTER SUCH REQUEST TAKE DELIVERY OF THE GOODS, HE IS LIABLE TO THE SELLER FOR ANY LOSS OCCASIONED BY HIS NEGLECT OR REFUSAL TO TAKE DELIVERY, AND ALSO FOR A REASONABLE CHARGE FOR THE CARE AND CUSTODY OF THE GOODS (1).

EXPLANATION: THIS RULE DOES NOT AFFECT THE RIGHTS OF THE SELLER WHERE THE NEGLECT OR REFUSAL OF THE BUYER TO TAKE DELIVERY AMOUNTS TO A REPUDIATION OF THE CONTRACT (2).

1. Greaves v. Ashlin, 3 Camp. p. 427.
   Dibble v. Corbett, 5 Bosworth, 202.
2. See r 34 (B).

CHAPTER V.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Rule 41.—(A.) IN THIS CHAPTER THE SELLER OF GOODS IS DEEMED TO BE AN "UNPAID SELLER"—

(1.) WHEN THE WHOLE OF THE PRICE HAS NOT BEEN PAID OR TENDERED (1);

(2.) WHEN A BILL OF EXCHANGE OR OTHER NEGOTIABLE INSTRUMENT HAS BEEN RECEIVED AS CONDITIONAL PAYMENT, AND THE CONDITION ON WHICH IT WAS RECEIVED HAS NOT BEEN FULFILLED BY REASON OF THE DISHONOR OF THE INSTRUMENT (2) OR OTHERWISE (3).

1. As the rights of the seller against the goods exist solely for the purpose of enabling the seller to obtain payment of the price, they cease to exist when the whole of the price is paid or tendered (*a*). But partial payment does not destroy these rights (*b*).

(*a*) Martindale v. Smith, 1 Q.B. 389.

(*b*) Hodgson v. Loy, 7 T.R. 436.
Feise v. Wray, 3 East, 93.
Ex parte Chalmers, L.R. 8 Ch. App. 289.
Newhall v. Vargas, 13 Me. 93, 108.
Bradley v. Michael, 1 Ind. 551.
Ware River R.R. Co. v. Vibbard, 114 Mass. 447, 458.
Owens v. Weedman, 82 Ill. 409.

2. When goods are put into the possession of the buyer in the expectation that he will immediately pay the price, a draft or check for the price is only a conditional payment, and if the draft or check, upon due presentment, is dishonored, the seller may reclaim the goods.

Hodgson v. Barrett, 33 Ohio St. 63, 68.
Weddigen v. Fabric Co. 100 Mass. 422.
Canadian Bank v. McCrea, 106 Ill. 281, 298.
Peoria, etc. Ry. Co. v. Buckley, 114 Ill. 337.

3 As in the case of the buyer's insolvency before the maturity of the bill or note, and while the goods are still in the custody of the seller, or have not yet got into the actual possession of the buyer.

Arnold v. Delano, 4 Cush. 33.
Milliken v. Warren, 57 Me. 46.
And see Miles v. Gorton, 2 Cr. & M. 504, 512.
Gunn v. Bolckow, L.R. 10 Ch. App. 491, 503.
Moses v. Rasin, 14 Fed. 772, 774.

Rule 41.—(B.) THE TERM "SELLER" HERE (1) INCLUDES ANY PERSON WHO IS IN THE POSITION OF A SELLER, AS, FOR INSTANCE, AN AGENT OF THE SELLER TO WHOM THE BILL OF LADING HAS BEEN INDORSED (2) OR A CONSIGNOR OR AGENT (3) WHO HAS HIMSELF PAID, OR IS DIRECTLY RESPONSIBLE FOR, THE PRICE (4).

1. *I. e.*, so far as relates to the rights of lien and stoppage *in transitu.*

2. Morison v. Gray, 2 Bing. 260.

3. Agent of the buyer.
See Gwyn v. R.R. Co. 85 N.Car. 429.

4. Feise v. Wray, 3 East, 93.
Tucker v. Humphrey, 4 Bing. 516.
Ireland v. Livingston, L.R. 5 H.L. p. 408.
Newhall v. Vargas, 13 Me. 93, 103.
Seymour v. Newton, 105 Mass. 272, 275.

The substance, rather than the form of a transaction, determines the rights and obligations of the parties, and, within the reason of the rule giving a seller a lien for the price of goods sold, and a right to stop them *in transitu* to the buyer on the happening of his insolvency, he, upon whose credit or with whose means the goods are purchased and by whom they are consigned to the buyer is in the position of a seller.

Muller v. Pondir, 55 N.Y. 325, 341.

A person who has paid the price of the goods for the buyer, and taken from him an assignment of the bill of lading as security for his advances is in such a position (*a*).

So is a buyer who has resold his interest under a contract to buy goods (*b*).

(*a*) Gossler v. Schepeler, 5 Daly, 476.

(*b*) Jenkyns v. Usborne, 7 M. & Gr. 678, 698.

Rule 42.—IN THIS CONNECTION A PERSON IS DEEMED TO BE INSOLVENT WHO EITHER HAS CEASED TO PAY HIS DEBTS IN THE ORDINARY COURSE OF BUSINESS (1), OR APPARENTLY CANNOT PAY HIS DEBTS AS THEY BECOME DUE (2).

1. Chandler v. Fulton, 10 Tex. 2, 12.
O'Brien v. Norris, 16 Md. 122, 132.
Durgy v. O'Brien, 123 Mass. 12.
Tuthill v. Skidmore, 124 N.Y. 148.

2. Queen v. Saddlers' Co. 10 H.L.C. p. 425.
Toof v. Martin, 13 Wal. p. 47.
Herrick v. Borst, 4 Hill, p. 653.
Lee v. Kilburn, 3 Gray, p. 600.
Benedict v. Schaettle, 12 Ohio St. 515, 519.
Bloomingdale v. R.R. Co. 6 Lea, 616, 621.

It is not necessary, to prove insolvency, that the buyer should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. The insolvency may be proved by any circumstances sufficient to show with reasonable certainty an inability to pay his debts as they fall due in the usual course of business.

Biddlecombe v. Bond, 4 A. & E. 332.
Hays v. Mouille, 14 Pa. St. 48, 52.
Naylor v. Dennie, 8 Pick. 205.
Durgy v. O'Brien, 123 Mass. 13.
Secomb v. Nutt, 14 B. Mon. 324.

Reynolds v. R.R. Co. 43 N.H 580, 592.
More v. Lott, 13 Nev. 376, 383.
Crummey v. Raudenbush, 55 Minn. 426, 428.
Atwater v. Bank, 152 Ill. 605.

Actual insolvency of the buyer is not essential. It is sufficient if he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency.

Diem v. Koblitz, 49 Ohio, St. 41, 51.

But the fact that the buyer has not property enough to make immediate payment of all claims against him falls short of showing that he is at the time insolvent. It often happens that men of large property, more than sufficient to pay all demands against them in the ordinary course of business, have not property enough for the purpose if all their creditors should at once press for payment.

Millard v. Webster, 54 Conn. 415, 417.

Rule 43.—(A.) SUBJECT TO THE RULES OF THIS CHAPTER AND ANY STATUTORY PROVISIONS IN THAT BEHALF, NOTWITHSTANDING THAT THE PROPERTY IN THE GOODS MAY HAVE PASSED TO THE BUYER, THE UNPAID SELLER OF GOODS, AS SUCH, HAS BY IMPLICATION OF LAW—

(1.) A LIEN ON THE GOODS FOR THE PRICE WHILE HE IS IN POSSESSION OF THEM;

(2.) IN CASE OF THE INSOLVENCY OF THE BUYER, A RIGHT OF STOPPING THE GOODS IN TRANSITU

AFTER HE HAS PARTED WITH THE POSSESSION OF THEM;

(3.) A RIGHT OF RESALE UNDER CERTAIN CIRCUMSTANCES.

(B.) WHERE THE PROPERTY IN GOODS HAS NOT PASSED TO THE BUYER, THE UNPAID SELLER HAS, IN ADDITION TO HIS OTHER REMEDIES, A RIGHT OF WITHHOLDING DELIVERY SIMILAR TO AND CO-EXTENSIVE WITH HIS RIGHTS OF LIEN AND STOPPAGE IN TRANSITU WHERE THE PROPERTY HAS PASSED TO THE BUYER.

Where, under the contract of sale, the property in the goods has not passed to the buyer, the seller's right to retain or resume possession of them is a right incident to the right of ownership. The seller's right to retain possession of the goods for security, where, under the contract of sale, the general property in the goods has passed to the buyer, or, as the right at this stage of the contract is called, the seller's lien, and his right in case of the insolvency of the buyer, called the right of stoppage *in transitu,* may be regarded as modified survivals of the right incident to his former absolute property or original ownership. The right of lien succeeds the right of control incident to ownership when the seller parts with the property in the goods, and the right of stoppage *in transitu* succeeds the right of lien when the seller parts with the possession as well as with the property in the goods. And thus the right of the unpaid seller as against the goods, though diminished from time to time, is not entirely divested

(unless waived) until the goods have come into the possession of the buyer.

See Bloxam v. Sanders, 4 B. & C. p. 948.
Griffiths v. Perry, 1 E. & E. p. 688.
Ex parte Chalmers, L.R. 8 Ch. App. p. 292.
Rowley v. Bigelow, 12 Pick. p. 313.
Arnold v. Delano, 4 Cush. p. 38.
Wood v. Yeatman, 15 B. Mon. p. 279.
White v. Welsh, 38 Pa. St. p. 420.
Arnold v. Carpenter, 16 R.I. p. 563.
Diem v. Koblitz, 49 Ohio St. p. 52.

The right of the unpaid seller against the goods is regarded with great favor on account of its intrinsic justice. If the buyer fails before payment and before the goods have actually reached him, it is manifestly inequitable to allow the goods to be appropriated to the payment of other creditors of the buyer.

Donath v. Broomhead, 7 Pa. St. p. 303.
Inslee v. Lane, 57 N.H. p. 458.
C. B. & Q. R.R. Co. v. Painter, 15 Neb. p. 396.
Farrell v. R.R. Co. 102 N. Car. p. 399.
Kingman v. Denison, 84 Mich. p. 611.
Harris v. Pratt, 17 N.Y. p 263.
Bethel v. Clark, 20 Q.B.D. p. 617.

Unpaid Seller's Lien.

Rule 44.—(A.) SUBJECT TO THE RULES OF THIS CHAPTER IN THAT BEHALF, THE UNPAID SELLER OF GOODS WHO IS IN POSSESSION OF THEM IS ENTITLED TO RETAIN POSSESSION OF THEM UNTIL PAYMENT OR TENDER OF THE PRICE, IN THE FOLLOWING CASES, NAMELY—

1. WHERE THE GOODS HAVE BEEN SOLD WITHOUT ANY STIPULATION AS TO CREDIT (1);

2. WHERE THE GOODS HAVE BEEN SOLD ON CREDIT, BUT THE TERM OF CREDIT HAS EXPIRED (2);

3. WHERE THE BUYER BECOMES OR IS DISCOVERED TO BE INSOLVENT (3).

(B.) AND IN SUCH CASES THE SELLER MAY EXERCISE HIS RIGHT OF LIEN, NOTWITHSTANDING THAT HE IS IN POSSESSION OF THE GOODS AS AGENT OR BAILEE FOR THE BUYER (4).

1. Bloxam v. Sanders, 4 B. & C. p. 948.
Miles v. Gorton, 2 Cr. & M. p. 511.
Arnold v. Delano, 4 Cush. p. 37.
Haskins v. Warren, 115 Mass. p. 533.
Allen v. Hartfield, 76 Ill. 358.
Toledo, etc. Ry. Co. v. Gilvin, 81 Ill. 511.
Owens v. Weedman, 82 Ill. 409.

When there is no agreement as to the time of delivery, or the time of payment, delivery and payment are to be contemporaneous; and although the property in the goods may have passed, the buyer has no right to the possession until he has paid or tendered the price. But if the goods are sold

on credit and without any agreement as to the time of delivery, the buyer is immediately entitled to the possession, and if he takes it, the lien of the seller is gone.

Spartali v. Benecke, 10 C.B. 212, 223.
Arnold v. Delano, 4 Cush. p. 38.
Leonard v. Davis, 1 Black, 476.
Thompson v. Wedge, 50 Wis. 642.

An agreement, however, as to the time of delivery may be implied from a known usage of trade.

Field v. Lelean, 6 H. & N. 617.

2. Valpy v. Oakeley, 16 Q.B. 941, 950.
Griffiths v. Perry, 1 E. & E. 680, 688.
Wade v. Moffett, 21 Ill. 110.
Owens v. Weedman, 82 Ill. p. 418.
White v. Welsh, 38 Pa. St. p. 400.
Ware River R.R. Co. v. Vibbard, 114 Mass. p. 458.

Where the seller remains in possession it would be unreasonable to allow the waiver of his lien implied from his giving credit to operate for a longer period than the time of credit.

3. Whether the goods have been sold on credit or not.

Bloxam v. Sanders, 4 B. & C. 941.
Bloxam v. Morley, 4 B. & C. 951.
Griffiths v. Perry, 1 E. & E. 680.
Ex parte Chalmers, L.R. 8 Ch. App. 289.
Arnold v. Delano, 4 Cush. 33.
Keeler v. Goodwin, 111 Mass. 490, 492.
Ware River R.R. Co. v. Vibbard, 114 Mass. 447, 454.
Benedict v. Field, 16 N.Y. 595.
Pardee v. Kanady, 100 N.Y. 121.
Tuthill v. Skidmore, 124 N.Y. 148.
White v. Welsh, 38 Pa. St. 396.
Wanamaker v. Yerkes, 70 Pa. St. 443.

Thompson v. R.R. Co. 28 Md. 396.
Owens v. Weedman, 82 Ill. pp. 417, 418.
Arnold v. Carpenter, 16 R.I. 560.
Rappleye v. Seeder Co. 79 Iowa, 220.
Robinson v. Morgan, 65 Vt. 37.
Bohn Mfg. Co. v. Hynes, 83 Wis. 388.
Crummey v. Raudenbush, 55 Minn. 426.

See also r 47, n 3.

A sale on credit is an implied waiver of the lien on condition that the buyer shall keep his credit good. "If therefore, before payment, the buyer becomes insolvent, and the seller still retains the custody of the goods or any part of them; or if the goods are in the hands of a carrier or middleman, on their way to the buyer, and have not yet got into his actual possession, and the seller, before they do so, can regain his actual possession by a stoppage *in transitu*, then his lien is restored, and he may hold the goods as security for the price."

Arnold v. Delano, 4 Cush. 33, 39.
Thompson v. R.R. Co. 28 Md. 396, 406.

If the insolvency of the buyer is discovered by the seller, while he yet has the goods, or while they are in transit and he retakes them, he may elect to treat the agreement for credit as at an end, and resell the goods, unless the buyer pay or tender the price. A party to a contract of sale cannot sue for its breach, unless he is himself able to perform on his part; it is, therefore, a good defense to an action by the buyer for damages for the failure to deliver the goods, that at the time fixed by the agreement for the delivery, he was insolvent, and on that account unable to perform his part of the contract.

Diem v. Koblitz, 49 Ohio St. 41.

Where there is a contract for the sale and deliv ery of goods by instalments, payment to be made in notes of the buyer as each instalment is delivered, the insolvency of the buyer is sufficient to justify the seller in refusing to continue the delivery, unless payment be made in cash; but it does not absolve him from offering to deliver the balance, or at least giving notice to the buyer, or receiver, of a readiness to deliver, in performance of the contract, if he intends to hold the purchasing party to it; he cannot insist upon damages for non-performance of the contract without showing performance or an offer to perform it on his own part with an ability to make good the offer if accepted.

Florence Mining Co. v. Brown, 124 U.S. 385.
And see Shaw v. Coal Co. 147 Ill. 526.

4. Townley v. Crump, 4 A. & E. 58.
Grice v. Richardson, 3 App. Cas. 319, 324.

And so long as the seller does not surrender actual possession, his lien remains, although he may have performed acts which amount to a constructive delivery.

Thompson v. R.R. Co. 28 Md. 396, 407.
Arnold v. Delano, 4 Cush. 33, 38.
White v. Welsh, 38 Pa. St. 396, 420.
Conrad v. Fisher, 37 Mo. App. 352.

Rule 45.—WHERE AN UNPAID SELLER HAS MADE PART DELIVERY OF THE GOODS, HE MAY EXERCISE HIS RIGHT OF LIEN ON THE REMAINDER, UNLESS SUCH PART DELIVERY HAS BEEN MADE UNDER SUCH CIRCUMSTANCES AS TO SHOW AN AGREEMENT TO WAIVE THE LIEN.

Dixon v. Yates, 5 B. & Ad. 313, 341.
Miles v. Gorton, 2 Cr. & M. 504, 512.
Ex parte Chalmers, L.R. 8 Ch. App. 289.
Haskell v. Rice, 11 Gray, 241.
Ware River R.R. Co. v. Vibbard, 114 Mass. 447, 458

See also r. 48 (G).

The lien for the unpaid price attaches to each and every part of the goods subject to it. A delivery of part of the goods releases the part delivered from the lien, but does not discharge the part remaining from the burden of the whole lien, unless it was the intention of the parties to do so (*a*). Delivery of a part may be a delivery of the whole. In agreeing for the delivery of goods with a person, you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that a delivery of part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole (*b*).

(*a*) New Haven, etc. Co. v. Campbell, 128 Mass. p. 107.

(*b*) Kemp v. Falk, 7 App. Cas. p. 586.
And see Parks v. Hall, 2 Pick. 213.

Rule 46.—(A.) THE UNPAID SELLER OF GOODS LOSES HIS LIEN THEREON—

1. WHEN HE DELIVERS THE GOODS TO A CARRIER OR OTHER BAILEE FOR THE PURPOSE OF TRANSMISSION TO THE BUYER (1) WITHOUT RESERVING THE RIGHT OF DISPOSAL OF THE GOODS (2);

2. WHEN THE BUYER OR HIS AGENT WITH THE ASSENT OR ACQUIESCENCE OF THE SELLER (3) OBTAINS POSSESSION OF THE GOODS (4);

3. BY WAIVER THEREOF (5).

1. See r 35 (A), n 2.

The seller loses his right of lien on the goods when he thus parts with the possession of them. But he then has in its place the right of stoppage *in transitu* (*a*). The two rights are distinct although sometimes confused in the cases where the buyer is insolvent. The right of lien, based on possession, can be exercised when the buyer is in default whether he be solvent or insolvent (*b*). The right of stoppage *in transitu*, existing after the buyer has parted with the possession, can be exercised only when the buyer is insolvent. The distinction is important when the buyer is in default but still solvent during the transit of the goods. In such case the seller as such has no remedy against the goods, but is confined to an action against the buyer for the price (*c*).

(*a*) Dutton v. Solomonson, 3 Bos. & Pul. p. 584. Bolton v. Ry. Co. L.R. 1 C.P. p. 439.

(*b*) Wade v. Moffett, 21 Ill. 110.

(*c*) Schmertz v. Dwyer, 53 Pa. St. 335, 338.

2 The seller is *prima facie* deemed to reserve the right of disposal, where goods are shipped and by the bill of lading they are deliverable to the order of himself or his agent.

See r 24 (B).

3. The rule does not apply where the possession is furtively obtained by the buyer (*a*), nor where the goods are merely "handed over" with the expectation of immediate payment, and payment is refused (*b*). But in such cases the seller should immediately reclaim the goods (*c*).

(*a*) Fawcett v. Osborn, 32 Ill. 411.
Gibbs v. Jones, 46 Ill. 319.
Bush v. Bender, 113 Pa. St. 94.

(*b*) Leven v. Smith, 1 Denio, 573.
Canadian Bank v. McCrea, 106 Ill. 281, 298.
Ames v. Moir, 130 Ill. 582, 591.

See also r 31, n 2.

(*c*) Bowen v. Burk, 13 Pa. St. 146.
Leatherbury v. Connor, 54 N.J.L. 172.

4. Hawes v. Watson, 2 B. & C. 543.
Cooper v. Bill, 3 H. & C. 722, 729.
Lupin v. Marie, 6 Wend. 77, 82.
Comer v. Cunningham, 77 N.Y. 391.
Welsh v. Bell, 32 Pa. St. 12.
Haskins v. Warren, 115 Mass. 514, 533.
Freeman v. Nichols, 116 Mass. 309.
McNail v. Ziegler, 68 Ill. 224.
Thompson v. Wedge, 50 Wis. 642.
McCraw v. Gilmer, 83 N. Car. 162.
Muskegon Booming Co. v. Underhill, 43 Mich. 629.
Blackshear v. Burke, 74 Ala. 239, 242.
Lewis v. Steiner, 84 Tex. 364.

The lien at common law of the seller of goods to secure the payment of the price is lost by the vol-

untary and unconditional delivery of the goods to the buyer; but this does not prevent the parties from contracting for a lien in the nature of a mortgage which, as between themselves, will be good after delivery.

Gregory v. Morris, 96 U.S. 619, 623.
Dodsley v. Varley, 12 A. & E. 632, 634.

5. The waiver may be express or implied in various ways:

(1.) The seller may give credit for the price and thereby waive his lien (*a*). In such case, however, the lien revives upon the insolvency or default of the buyer, if the goods have not previously passed out of the control of the seller (*b*).

(*a*) Spartali v. Benecke, 10 C.B. 212, 223.
Leonard v. Davis, 1 Black, 476.

(*b*) Ware River R.R. Co. v. Vibbard, 114 Mass. 447, 458.
See also r 44 (A), ns 2, 3.

(2) The seller may assent to a re-sale to a third person and thus estop himself from asserting his lien as against such person.

Pearson v. Dawson, E.B. & E. 448.
Knights v. Wiffen, L.R. 5 Q.B. 660.
Voorhis v. Olmstead, 66 N.Y. 113.
See also r 50, ns 2, 3.

(3) The seller may enter into a special agreement inconsistent with the existence or continuance of the lien.

In re Leith's Estate, 1 P.C. p. 305.
Douglas v. Shumway, 13 Gray, 498, 502.
Pickett v. Bullock, 52 N.H. 354.

Rule 46.—(B.) THE UNPAID SELLER OF GOODS, HAVING A LIEN THEREON DOES NOT LOSE HIS LIEN BY REASON ONLY THAT HE HAS OBTAINED JUDGMENT FOR THE PRICE OF THE GOODS.

Houlditch v. Desanges, 2 Starkie, 337.
Scrivener v. G.N. Ry. Co. 19 W.R. 388.

Stoppage in Transitu.

Rule 47. SUBJECT TO THE SUCCEEDING RULES IN THAT BEHALF, WHEN THE BUYER OF GOODS BECOMES OR IS DISCOVERED TO BE INSOLVENT, THE UNPAID SELLER WHO HAS PARTED WITH THE POSSESSION OF THE GOODS HAS THE RIGHT OF STOPPING THEM IN TRANSITU (1), THAT IS TO SAY, HE MAY RESUME POSSESSION OF THE GOODS AS LONG AS THEY ARE IN COURSE OF TRANSIT (2), AND MAY RETAIN THEM UNTIL PAYMENT OR TENDER OF THE PRICE (3).

1. The right of stoppage *in transitu* is treated as an extension of the common law lien of the seller for the price (*a*). It exists in the single case of the insolvency of the buyer and presupposes that the possession is in a third person in the transit to the buyer (*b*). The basis of this right is that the insolvency of the buyer was not contemplated by the seller, and that it is just that he should, on account of that unforeseen event endangering the loss of the price, be permitted to reclaim the goods and keep them as security for

payment at any time before a delivery terminating their transit (*c*).

It is not necessary that the insolvency should occur after the sale. It is sufficient if it becomes known to the seller after that time. The privilege is just as essential in one case as in the other for his protection against the insolvency of the buyer. But if the seller knows of the insolvency at the time of the sale, it is his own fault if he does not protect himself by not parting with the possession (*d*). That the seller may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency, may be regarded as settled by the late authorities (*e*).

(*a*) Rowley v. Bigelow, 12 Pick. p. 313.
Grout v. Hill, 4 Gray, p. 366.
Atkins v. Colby, 20 N.H. p. 155.
Benedict v. Schaettle, 12 Ohio St. p. 521.

(*b*) St. Joze Indiano, 1 Wheat. p. 212.

(*c*) Harris v. Pratt, 17 N.Y. p. 263.

(*d*) Buckley v. Furniss, 15 Wend. p. 143.
Fenkhausen v. Fellows, 20 Nev. 312, 316.

(*e*) Benedict v. Schaettle, 12 Ohio St. 515.
Reynolds v. R.R. Co. 43 N.H. 580.
O'Brien v. Norris, 16 Md. 122.
Blum v. Marks, 21 La. An. 268.
Loeb v. Peters, 63 Ala. 243.
Farrell v. R.R. Co. 102 N. Car. 390.
Kingman v. Denison, 84 Mich. 608.

2. Judges do not ordinarily distinguish between the retainer of goods by the seller, and their stoppage *in transitu* on account of the insolvency of the buyer; because these terms refer to the same right, only at different stages of perfection and

execution of the contract. The rule is, that so long as the unpaid seller has the actual possession of the goods or as they are in the custody of his agents, and while they are in transit from him to the buyer, he has a right to refuse or countermand the final delivery, if the buyer be in failing circumstances.

White v. Welsh, 38 Pa. St. p. 420.

3. The rule applies whether the goods have been sold on credit or not.

Stubbs v. Lund, 7 Mass. 453, 456.
Mottram v. Heyer, 5 Denio. p. 630.
Babcock v. Bonnell, 80 N.Y. 244.
Atkins v. Colby, 20 N.H. 154.
Clapp v. Sohmer, 55 Iowa, 273.
Diem v. Koblitz, 49 Ohio St. 41.

See also r 44 (A), n 3.

Rule 48.—(A.) GOODS ARE DEEMED TO BE IN COURSE OF TRANSIT FROM THE TIME WHEN THEY ARE DELIVERED TO A CARRIER BY LAND OR WATER, OR OTHER BAILEE, FOR THE PURPOSE OF TRANSMISSION TO THE BUYER, UNTIL THE BUYER, OR HIS AGENT IN THAT BEHALF, TAKES DELIVERY OF THEM FROM SUCH CARRIER OR OTHER BAILEE.

The right of stoppage *in transitu* is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the seller and the buyer in process and for the purpose of delivery (*a*). It is not material whether the person in whose possession they are

when the seller interposes his claim be a carrier, a warehouse keeper, a wharfinger, packer or other depositary, or an agent for the purpose of forwarding, nor by which of the parties to the sale he was employed (*b*). When the goods have not been delivered to the buyer or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the buyer's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped (*c*).

(*a*) Kingman v. Denison, 84 Mich. p. 611.
Gibson v. Carruthers, 8 M. & W. p. 328.
Schotsmans v. Ry. Co. L.R. 2 Ch. App. pp. 335, 338.

(*b*) Harris v. Pratt, 17 N.Y. p. 252.
Ex parte Rosevear China Clay Co. 11 Ch. D. 560.

(*c*) Bethell v. Clark, 20 Q.B.D. 615, 617.
Lyons v. Hoffnung, 15 App. Cas. 391, 397.

The goods get home when they come into the hands of the buyer or of an agent so far representing the buyer as to make a delivery to him a full and final delivery to the buyer, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance to or on the account of the buyer in a mere course of transit towards him.

Lyons v. Hoffnung, 15 App. Cas. p. 396.
Aguirre v. Parmelee, 22 Conn. p. 482.
Inslee v. Lane, 57 N.H. p. 458.

The seller has the right of stoppage until the goods actually get into the hands of the buyer or of some one who receives them in the character of his servant or agent to hold them at his disposal,

though the goods may have arrived at the station or port of their destination (*a*), and though they may have been placed by the carrier in his own (*b*) or another's warehouse (*c*).

(*a*) Whitehead v. Anderson, 9 M. & W. 518.
Bolton v. Ry. Co. 1 C.P. 431, 439.
Coventry v. Gladstone, L.R. 6 Eq. 44.
Ex parte Barrow, 6 Ch. D. 783.
Naylor v. Dennie, 8 Pick. 198.
Seymour v. Newton, 105 Mass. 272.
Mottram v. Heyer, 5 Denio, 629.
McFetridge v. Piper, 40 Iowa. 627.
Inslee v. Lane, 57 N.H. 454.
White v. Mitchell, 38 Mich. 390.
Kingman v. Denison, 84 Mich. 608.
Harris v. Tenney, 85 Tex. 254.

(*b*) Calahan v. Babcock, 21 Ohio St. 281, 293.
Clapp v. Peck, 55 Iowa, 270.
Symns v. Schotten, 35 Kan. 310.

(*c*) Covell v. Hitchcock, 23 Wend. 611.
O'Neil v. Garrett, 6 Iowa, 480.
More v. Lott, 13 Nev. 376.

In *Kendal* v. *Marshall*, (11 Q.B.D. p. 364) Brett, L. J., says: "Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit, connected with the transmission and delivery of them, * * * having been there deposited by the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly."

An intervening attachment or execution against the buyer does not defeat the right of stoppage(*a*), though the officer after the levy stores the goods in the buyer's building (*b*), and though, but for the levy, the goods would have probably fallen into the hands of the buyer (*c*).

(*a*) Smith v. Goss, 1 Camp. 282.
Naylor v. Dennie, 8 Pick. 198.
Durgy v. O'Brien, 123 Mass. 14.
Buckley v. Furniss, 15 Wend. 137, 143.
Hause v. Judson, 4 Dana, 7, 11.
Hays v. Mouille, 14 Pa. St. 48.
Cabeen v. Campbell, 30 Pa. St. 258.
O'Brien v. Norris, 16 Md. 122.
Blackman v. Pierce, 23 Cal. 508, 511.
Calahan v. Babcock, 21 Ohio St. 281.
Rucker v. Donovan, 13 Kan. 251.
Farrell v. R.R. Co. 102 N Car. 390, 401.
Dreyfus v. Mayer, 69 Miss. 282.

(*b*) Sherman v. Rugee, 55 Wis 346
Harris v. Tenney, 85 Tex. 254.

(*c*) O'Neil v. Garrett, 6 Iowa, 480.

The right of stoppage, being an extension of the seller's lien, is paramount to the lien acquired by the levy which operates only upon the interest of the debtor. And the levy is not a taking possession by the buyer's authority, the proceeding being *in invitum.*

Rule 48.—(B.) IF THE BUYER OR HIS AGENT IN THAT BEHALF OBTAINS DELIVERY OF THE GOODS BEFORE THEIR ARRIVAL AT THE APPOINTED DESTINATION, THE TRANSIT IS AT AN END.

Whitehead v. Anderson, 9 M. & W. p. 534.
Kendal v. Marshall, 11 Q.B.D. pp. 366, 369.

Secomb v. Nutt, 14 B. Mon. 324, 327.
Wood v. Yeatman, 15 B. Mon. 270, 280.
Stevens v. Wheeler, 27 Barb. 658.
Harris v. Pratt, 17 N.Y. p. 264.
Mohr v. R.R. Co. 106 Mass. p. 72.

The carrier may deliver the goods at another place when so directed by the consignee (*a*) unless he has notice that the consignee is not the owner of the goods (*b*).

(*a*) London, etc. Ry. Co. v. Bartlett, 7 H. & N. 400.
Cork Distilleries Co. v. Ry. Co. L.R. 7 H.L. 269.
Lewis v. R.R. Co. 11 Met. 509.
Sweet v. Barney, 23 N.Y. 335.
Penn. Co. v. Holderman, 69 Ind. 18.

(*b*) Southern Express Co. v. Dickson, 94 U.S. 549

Rule 48.—(C.) IF, AFTER THE ARRIVAL OF THE GOODS AT THE APPOINTED DESTINATION, THE CARRIER OR OTHER BAILEE ACKNOWLEDGES TO THE BUYER, OR HIS AGENT, THAT HE HOLDS THE GOODS ON HIS BEHALF AND CONTINUES IN POSSESSION OF THEM AS BAILEE FOR THE BUYER, OR HIS AGENT, THE TRANSIT IS AT AN END (1), AND IT IS IMMATERIAL THAT A FURTHER DESTINATION FOR THE GOODS MAY HAVE BEEN INDICATED BY THE BUYER (2).

1. Foster v. Frampton, 6 B. & C. 107.
Langstaff v. Stix, 64 Miss. 171, 174.
Hall. v. Dimond, 63 N.H. 565.
Williams v. Hodges, 113 N. Car. 36.

2. It is often difficult to determine what is the appointed destination as between the buyer and the

seller where the goods have arrived at a designated place to be transported elsewhere.

If the party in charge of the goods at the intermediate place is an agent of the buyer with authority to communicate to the goods another substantive destination, or to hold them until a fresh destination is communicated to them by orders from the buyer, the transit is at an end as between the buyer and the seller (*a*).

But if it was contemplated by the parties to the sale that the goods should be transmitted to an ulterior destination, and the party in charge of the goods at the intermediate place has them in charge simply for the purpose of forwarding them to the ulterior destination, the transit is not at an end even though he may be awaiting further instructions from the buyer as to the mode and time of their shipment (*b*).

(*a*) Dixon v. Baldwen, 5 East, 175.
Dodson v. Wentworth, 4 M. and Gr. 1080.
Valpy v. Gibson, 4 C.B. 837, 865.
Ex parte Gibbes, I. Ch. D. 101.
Kendal v. Marshall, 11 Q.B.D. 356.
Ex parte Miles, 15 Q.B.D. 39.
Guilford v. Smith, 30 Vt. 49.
Becker v. Hallgarten, 86 N.Y. 167, 173.
Brooke Iron Co. v. O'Brien, 135 Mass. 442, 446.

(*b*) Coates v. Railton, 6 B. & C. 422.
Ex parte Watson, 5 Ch. D. 35.
Ex parte Rosevear China Clay Co. 11 Ch. D. 560.
Bethell v. Clark, 20 Q.B.D. 615.
Lyons v. Hoffnung, 15 App. Cas. 391.
Covell v. Hitchcock, 23 Wend. 611.
Harris v. Pratt, 17 N.Y. 249.
Cabeen v. Campbell, 30 Pa. St. 254.
Blackman v. Pierce, 23 Cal. 508.
Mohr v. R.R. Co. 106 Mass. 67.

Upon this question Lord Esher says: "Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists: but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit."

Bethel v. Clark, 20 Q.B.D. p. 617.
See also Diehl v. McCormick, 143 Pa. St. 584, 594.

Rule 48.—(D.) IF THE GOODS ARE REJECTED BY THE BUYER, AND THE CARRIER OR OTHER BAILEE CONTINUES IN POSSESSION OF THEM, THE TRANSIT IS NOT DEEMED TO BE AT AN END (1), EVEN IF THE SELLER HAS REFUSED TO RECEIVE THEM BACK (2).

1. Grout v. Hill, 4 Gray, 367.
Morris v. Shryock, 50 Miss. 599.
Greve v. Dunham, 60 Iowa, 108.
Mason v. Wilson, 43 Ark. 172, 176.
Tufts v. Sylvester, 79 Me. 213, 215.
Jenks v. Fulmer, 160 Pa. St. 527.

As the *transitus* is not at an end until the goods have come into the actual possession of the buyer, or of his agent to be held at his disposal, it follows that the right of stoppage may be exercised where the buyer declines to receive the goods.

2. Bolton v. Ry. Co. L.R. 1 C.P. 431, 440.

Rule 48.—(E.) WHEN GOODS ARE DELIVERED TO A SHIP CHARTERED BY THE BUYER IT IS A QUESTION DEPENDING ON THE CIRCUMSTANCES OF THE PARTICULAR CASE, WHETHER THEY ARE IN THE POSSESSION OF THE MASTER AS A CARRIER, OR AS AGENT TO THE BUYER.

Whether or not a ship chartered by the buyer is to be considered his own ship for this purpose, may depend on the terms and construction of the charter party; that is to say, whether the charter party is intended to operate as a demise of the vessel so as to give up to the charterer the entire control and disposal of the vessel and of the services of the master and crew for the period of the demise; or whether the ship owner remains in possession of the vessel by the master and crew as his servants.

See Bohtlingk v. Inglis, 3 East, 381, 396.
Sandeman v. Scurr, L.R. 2 Q.B. p. 96.
Berndtson v. Strang, L.R. 4 Eq. 481, 489; L.R. 3 Ch. App. 588, 590.
Ex parte Rosevear China Clay Co. 11 Ch. D. 560.

A ship chartered by the buyer may by express stipulation or appointment be made the place of delivery as between the buyer and seller.

Rowley v. Bigelow, 12 Pick. 307, 314.
Brooke Iron Co. v. O'Brien, 135 Mass. 442, 446.

A delivery of the goods on board of the buyer's own ship is a delivery to him (*a*) unless the seller by the bill of lading or otherwise restrains the effect of such delivery; as by a provision that the goods are "to be delivered at" the port of destination to the buyer or his assigns (*b*).

(*a*) Schotsmans v. Ry. Co. L.R. 2 Ch. App. 332.

(*b*) Turner v. Trustees, 6 Exch. 543, 567.
Stubbs v. Lund, 7 Mass. 453, 457.
Ilsley v. Stubbs, 9 Mass. 65.
Newhall v. Vargas, 13 Me. 93.
Cross v. O'Donnell, 44 N.Y. p. 666.

Rule 48.—(F.) WHERE THE CARRIER OR OTHER BAILEE WRONGFULLY REFUSES TO DELIVER THE GOODS TO THE BUYER, OR HIS AGENT IN THAT BEHALF, THE TRANSIT IS DEEMED TO BE AT AN END.

Bird v. Brown, 4 Exch. 786, 797.

Rule 48.—(G.) WHERE PART DELIVERY OF THE GOODS HAS BEEN MADE TO THE BUYER, OR HIS AGENT IN THAT BEHALF, THE REMAINDER OF THE GOODS MAY BE STOPPED IN TRANSITU, UNLESS SUCH PART DELIVERY HAS BEEN MADE UNDER SUCH CIRCUMSTANCES AS TO SHOW AN AGREEMENT TO GIVE UP POSSESSION OF THE WHOLE OF THE GOODS.

Bolton v. Ry. Co. L.R. 1 C.P. 431, 440.
Ex parte Cooper, 11 Ch. D. 68.
Kemp v. Falk, 7 App. Cas. 573, 586.
Buckley v. Furniss, 17 Wend. 504.
Secomb v. Nutt, 14 B. Mon. 324.

See also r 45.

Rule 49.—(A.) THE UNPAID SELLER (1) MAY EXERCISE HIS RIGHT OF STOPPAGE IN TRANSITU EITHER BY TAKING ACTUAL POSSESSION OF THE GOODS (2), OR BY GIVING NOTICE OF HIS CLAIM TO THE CARRIER OR OTHER BAILEE IN WHOSE POSSESSION THE GOODS ARE (3). SUCH NOTICE MAY BE GIVEN EITHER TO THE PERSON IN ACTUAL POSSESSION OF THE GOODS OR TO HIS PRINCIPAL. IN THE LATTER CASE THE NOTICE, TO BE EFFECTUAL, MUST BE GIVEN AT SUCH TIME AND UNDER SUCH CIRCUMSTANCES THAT THE PRINCIPAL, BY THE EXERCISE OF REASONABLE DILIGENCE, MAY COMMUNICATE IT TO HIS SERVANT OR AGENT IN TIME TO PREVENT A DELIVERY TO THE BUYER (4).

1. Any agent authorized to act for the seller, either generally or for the purposes of the consignment, may stop the goods without any special authority to that effect (*a*). And a stoppage made on behalf of the seller by an unauthorized person will be effectual if ratified at any time before the termination of the transit (*b*), but not afterwards (*c*).

(*a*) Reynolds v. R.R. Co. 43 N.H. 580, 589.
Bell v. Moss, 5 Wharton, 189, 206.
Chandler v. Fulton, 10 Tex. 2, 18.

(*b*) Durgy v. O'Brien, 123 Mass. 12, 14.

(*c*) Bird v. Brown, 4 Exch. 786, 797.

2. Snee v. Prescot, 1 Atk. 245, 250.
Whitehead v. Anderson, 9 M. & W. p. 534.

3. Litt v. Cowley, 7 Taunt. 169, 170.
Newhall v. Vargas, 13 Me. 93, 109.
O'Brien v. Norris, 16 Md. 122, 130.
Seymour v. Newton, 105 Mass. 272, 275.
Bloomingdale v. R.R. Co. 6 Lea, 616, 619.

No particular form of notice is required (*a*). If the carrier is clearly informed that it is the intention and desire of the seller to exercise his right of stoppage *in transitu*, the notice is sufficient (*b*). It need not state the nature or basis of the claim to have the goods stopped (*c*), nor demand a redelivery of the goods (*d*).

(*a*) Rucker v. Donovan, 13 Kan. 251, 255.

(*b*) Jones v. Earl, 37 Cal. 630, 632.

(*c*) Allen v. R.R. Co. 79 Me. 327, 333.

(*d*) Reynolds v. R.R. Co. 43 N.H. 580, 591.

Notice to the agent of the carrier, who, in the regular course of his agency has the actual custody of the goods at the time the notice is given, is notice to the carrier.

Jones v. Earl, 37 Cal. 630, 633.

4. Whitehead v. Anderson, 9 M. & W. 518, 533.
Ex parte Watson, 5 Ch. D. 35.
Kemp v. Falk, 7 App. Cas. p. 585.
Mottram v. Heyer, 5 Denio, p. 634.
See Poole v. Ry. Co. 58 Tex. 134, 138, 140.

Rule 49.—(B.) WHEN NOTICE OF STOPPAGE IN TRANSITU IS GIVEN BY THE SELLER TO THE CARRIER, OR OTHER BAILEE IN POSSESSION OF THE GOODS, HE MUST, UPON PAYMENT OR TENDER OF ACCRUED CHARGES FOR FREIGHT OR STORAGE (1), RE-DELIVER THE GOODS TO, OR ACCORDING TO THE DIRECTIONS OF, THE SELLER (2). THE EXPENSES OF SUCH RE-DELIVERY MUST BE BORNE BY THE SELLER.

1. Hays v. Mouille, 14 Pa. St. 48.
Penn. R.R. Co. v. Oil Works, 126 Pa. St. 485.
Rucker v. Donovan, 13 Kan. 251.
Potts v. R.R. Co. 131 Mass. 455.
Penn. Steel Co. v. R.R. & B. Co. (Ga. 1894), 21 S.E. Rep. 577.
See also Greve v. Dunham, 60 Iowa, 108.

2. The Tigress, 32 L.J. Adm. 97, 102.
Pontifex v. Ry. Co. 3 Q.B.D. 23, 27.
Jones v. Earl, 37 Cal. 630.
Bloomingdale v. R.R. Co. 6 Lea, 616.
Allen v. R.R. Co. 79 Me. 327.

The due exercise of the right of stoppage is at the seller's peril, and it is incumbent upon the carrier to give effect to a claim, as soon as he is satisfied it is made by the seller, unless he is aware of a legal defeasance of the claim.

The Tigress, 32 L.J. Adm. 97, 101.
The E. H. Pray, 27 Fed. 474, 475.
The Vidette, 34 Fed. 396, 398.

Re-sale by Buyer or Seller.

Rule 50.—THE UNPAID SELLER'S RIGHT OF LIEN OR STOPPAGE IN TRANSITU IS NOT AFFECTED BY ANY SALE OR OTHER DISPOSITION OF THE GOODS WHICH THE BUYER MAY HAVE MADE (1), UNLESS THE SELLER HAS ASSENTED THERETO, AND THE ASSENT UNDER THE CIRCUMSTANCES AMOUNTS TO A DELIVERY TO THE SUB-BUYER (2), OR TO AN ESTOPPEL (3).

PROVIDED THAT WHERE A DOCUMENT OF TITLE TO GOODS (4) HAS BEEN LAWFULLY TRANSFERRED TO ANY PERSON AS BUYER OR OWNER OF THE GOODS, AND THAT PERSON TRANSFERS THE DOCUMENT TO A PERSON WHO TAKES THE DOCUMENT IN GOOD FAITH (5) AND FOR A VALUABLE CONSIDERATION (6), THEN, IF SUCH LAST MENTIONED TRANSFER WAS BY WAY OF SALE, THE UNPAID SELLER'S RIGHT OF LIEN OR STOPPAGE IN TRANSITU IS DEFEATED, AND IF SUCH LAST MENTIONED TRANSFER WAS BY WAY OF PLEDGE OR OTHER DISPOSITION FOR VALUE, THE UNPAID SELLER'S RIGHT OF LIEN OR STOPPAGE IN TRANSITU CAN ONLY BE EXERCISED SUBJECT TO THE RIGHTS OF THE TRANSFEREE (7).

1. Lien.

Dixon v. Yates, 5 B. & Ad. 313.
M'Ewan v. Smith, 2 H.L. Cas. 309.
Farmeloe v. Bain, 1 C.P.D. 445.
Haskell v. Rice, 11 Gray, 240.
Keeler v. Goodwin, 111 Mass. 490.

Milliken v. Warren, 57 Me. 50.
Anderson v. Read, 106 N.Y. 333.
Robinson v. Morgan, 65 Vt. 37.

Stoppage *in transitu*.

Craven v. Ryder, 6 Taunt. 433.
Ilsley v. Stubbs, 9 Mass. 65, 73.
Seymour v. Newton, 105 Mass. p. 275.
Holbrook v. Vose, 6 Bosw. 76, 106.
Pattison v. Culton, 33 Ind. 240.

An assignment by the buyer (whether for value (*a*) or for the benefit of creditors (*b*),) would not defeat the right unless the assignee should lawfully obtain possession of the goods before the exercise of the right.

(*a*) U.S. Engine Co. v. Oliver, 16 Neb. 612, 614.
Stevens v. Wheeler, 27 Barb. 658.

(*b*) Ellis v. Hunt, 3 T.R. 464, 467.
Scott v. Pettit, 3 B. & P. 469.
Conyers v. Ennis, 2 Mason, 236.
Blow v. Gage, 44 Ill. 217.
McElroy v. Seery, 61 Md. 398.

2. Stoveld v. Hughes, 14 East, 308.
Pearson v. Dawson, E.B. & E. 448.

3. Woodley v. Coventry, 2 H. & C. 164.
Knights v. Wiffen, L.R. 5 Q.B. 660.
Merchant Banking Co. v. Steel Co. 5 Ch. D. 205, 217.
Hunn v. Bowne, 2 Caines, 38.
Voorhis v. Olmstead, 66 N.Y. 113.
Robinson v. Morgan, 65 Vt. p. 41.

And the transit to the buyer is treated as at an end where the seller with knowledge of the subsale ships the goods directly to the buyer.

Eaton v. Cook, 32 Vt. 58.
Treadwell v. Aydlett, 9 Heisk. 388.
Memphis, etc. R.R. Co. v. Freed, 38 Ark. 614.
See also Gwyn v. R.R. Co. 85 N. Car. 429.

4. Bill of Lading.

Lickbarrow v. Mason, 2 T.R. 63; 1 Smith Lead. Cas. (9th ed.) p. 737.
Dows v. Greene, 24 N.Y. 638.
Rawls v. Deshler, 4 Abb. (N.Y.) App. Dec. 12.
Becker v. Hallgarten, 86 N.Y. 167.
M.C. R.R. Co. v. Phillips, 60 Ill. 190.
W.U. R.R. Co. v. Wagner, 65 Ill. 197.
Newhall v. R.R. Co. 51 Cal. 345.

In several of the states a warehouse receipt.

See r 28 (A), n 1.

5. Cuming v. Brown, 9 East, 506.
Rosenthal v. Dessau, 11 Hun, 49.
Loeb v. Peters, 63 Ala. 243.
Canadian Bank v. McCrea, 106 Ill. 281.

6. It has been held that where a person takes a bill of lading in payment of an antecedent debt he is a holder for value (*a*).

It seems to be otherwise where he takes it merely as collateral security for such debt (*b*); and so it is where he takes it as assignee for the benefit of creditors (*c*).

(*a*) Leask v. Scott, 2 Q.B.D. 376.
Railroad Co. v. Nat. Bank, 102 U.S. p. 48.
Lee v. Kimball, 45 Me. 172.
Hurd v. Bickford, 85 Me. p. 219.
Paddon v. Taylor, 44 N.Y. 371.
Davis v. Russell, 52 Cal. 611.
St. Paul Mill Co. v. Despatch Co. 27 Fed. 434.
First Nat. Bank v. Schmidt (Colo. 1895), 40 Pac. Rep. 479.

See also r 27, n.

(*b*) Lesassier v. The Southwestern, 2 Woods, 35.
Loeb v. Peters, 63 Ala. 243, 249.
Conrad v. Fisher, 37 Mo. App. 352.
Vogelsang v. Fisher (Mo. App. 1895), 31 S.W. Rep. 13.

And see Poor v. Woodburn, 25 Vt. 234.
Dovey's Appeal, 97 Pa. St. p. 162.

Goodwin v. Loan Co. 152 Mass. 199.
McGraw v. Solomon, 83 Mich. 442.

(*c*) Stanton v. Eager, 16 Pick. 467, 476.

7. In re Westzinthus, 5 B. & Ad. 817.
Spalding v. Ruding, 6 Beav. 376.
Kemp v. Falk, 7 App. Cas. 573, 576.
Chandler v. Fulton, 10 Tex. 2, 23.
Misso. Pacific Ry. Co. v. Heidenheimer, 82 Tex. 195 199.
Forbes v. R.R. Co. 133 Mass. 154, 156.

Rule 51.—(A.) SUBJECT TO THE RULES OF THIS CHAPTER IN THAT BEHALF, A CONTRACT OF SALE IS NOT RESCINDED BY THE MERE EXERCISE BY AN UNPAID SELLER OF HIS RIGHT OF LIEN (1) OR STOPPAGE IN TRANSITU (2).

1. Martindale v. Smith, 1 Q.B. 389.
Pardee v. Kanady, 100 N.Y. 121, 126.

It is only upon the theory that the contract exists that the seller can maintain an action against the buyer for the full contract price (*a*), or for any loss occasioned by non-fulfillment of the contract (*b*).

(*a*) See Patten's Appeal, 45 Pa. St. 151, 158.
Hayden v. Demets, 53 N.Y. 426, 431.
Bagley v. Findlay, 82 Ill. p. 525.
Ames v. Moir, 130 Ill. 582, 591.

(*b*) See Maclean v. Dunn, 4 Bing. 722, 728.
Acebal v. Levy, 10 Bing. p. 384.

2. See Wentworth v. Outhwaite, 10 M. & W. 436.
Page v. Cowasjee, L.R. 1 P.C. p. 145.
Schotsmans v. Ry. Co. L.R. 2 Ch. App. p. 340.
Kemp v. Falk, 7 App. Cas. p. 581.
Jordan v. James, 5 Ohio, p. 98.
Diem v. Koblitz,, 49 Ohio St. p. 52.
Rowley v. Bigelow, 12 Pick. p. 313.
Stanton v. Eager, 16 Pick. p. 475.
Patten's Appeal, 45 Pa. St. p. 158.
Penn. R.R. Co. v. Oil Works, 126 Pa. St. p. 493.
Cross v. O'Donnell, 44 N.Y. p. 665.
Babcock v. Bonnell, 80 N.Y. p. 251.
Newhall v. Vargas, 15 Me. p 320.
Chandler v. Fulton, 10 Tex. p. 23.
Rucker v. Donovan, 13 Kan. p. 255.
Allyn v. Willis, 65 Tex. p. 74.
Bloomingdale v. R.R. Co. 6 Lea, p. 623.
Brooks v. Paper Co. 94 Tenn. p. 710.

By the mere exercise of the right of stoppage *in transitu* the seller is simply reinstated in the position of a seller who has never parted with the possession.

As to what would be evidence of a rescission or determination of the contract see:

Morgan v. Bain, L.R. 10 C.P. 15.
Hobbs v. Brick Co. 157 Mass. 109, 111.
Florence Mining Co. v. Brown, 124 U.S. 385, 390.
Arnold v. Carpenter, 16 R.I. 560, 562.
Shaw v. Coal Co. 147 Ill. 526, 532.
Sturtevant v. Orser, 24 N.Y 538, 544.

And see r 48(D).

Rule 51.—(B.) WHERE AN UNPAID SELLER WHO HAS RETAINED POSSESSION OF THE GOODS OR RIGHTFULLY STOPPED THEM IN TRANSITU RE-SELLS THE GOODS TO AN INNOCENT BUYER, THE LATTER ACQUIRES A GOOD TITLE THERETO AS AGAINST THE ORIGINAL BUYER.

See r 28 (A).

Rule 51.—(C.) WHERE THE GOODS ARE OF A PERISHABLE NATURE (1), OR WHERE THE UNPAID SELLER GIVES NOTICE TO THE BUYER OF HIS INTENTION TO RE-SELL (2), AND THE BUYER DOES NOT WITHIN A REASONABLE TIME PAY OR TENDER THE PRICE, THE UNPAID SELLER MAY RE-SELL THE GOODS AND RECOVER FROM THE ORIGINAL BUYER DAMAGES FOR ANY LOSS OCCASIONED BY HIS BREACH OF CONTRACT (3).

1. Maclean v. Dunn, 4 Bing. p. 728.
   Sands v. Taylor, 5 Johns. 395, 409, 411.
   Ullman v. Kent, 60 Ill. 271, 273.
   Camp v. Hamlin, 55 Ga. 259.
   Grist v. Williams, 111 N. Car. 53, 55.

It would be unreasonable to oblige the seller to let the goods perish on his hands, and run the risk of the solvency of the buyer.

2. Notice to the buyer of the seller's intention to re-sell is sufficient; notice to him of the time and place, although usual and prudent in view of any question that might be raised as to the fairness of the re-sale is not absolutely required.

Pollen v. LeRoy, 30 N.Y. 549, 556.
Van Brocklen v. Smeallie, 140 N. Y. 70, 75.
Gaskell v. Morris, 7 W. & S. 32, 38.
Rosenbaums v. Weeden, 18 Grattan, 785, 794.
Waples v. Overaker, 77 Tex. 7, 12.
Ingram v. Wackernagel, 83 Iowa. 82.

3. Maclean v. Dunn, 4 Bing. 722, 728.
Lord v. Price, L.R. 9 Ex. p. 55.
Ex parte Stapleton, 10 Ch. D. 586.
Sands v. Taylor, 5 Johns. 395.
Dustan v. McAndrew, 44 N.Y. 72.
Girard v. Taggart, 5 S. & R. 19, 32.
Van Horn v. Rucker, 33 Mo. 391.
Saladin v. Mitchell, 45 Ill. 79.
Bagley v. Findlay, 82 Ill. 524.
Roeblings' Co. v. Fence Co. 130 Ill. 660.
Whitney v. Boardman, 118 Mass. 242.
Putnam v. Glidden, 159 Mass. p. 49.
Phelps v. Hubbard, 51 Vt. 489.

In such case the seller acts as agent for the buyer, and where the re-sale is fairly made, within a reasonable time (*a*) and in the mode best calculated to produce the real value of the goods (*b*), the seller, in case of loss on the re-sale, may recover from the original buyer the difference between the contract price and that realized at the re-sale (*c*).

(*a*) Saladin v. Mitchell, 45 Ill. 79, 85.
Pickering v. Bardwell, 21 Wis. 562, 566.
Smith v. Pettee, 70 N.Y. 13, 18.

(*b*) Crooks v. Moore, 1 Sandf. 297, 303.
Pollen v. LeRoy, 30 N.Y. 549, 557.
Lewis v. Greider, 51 N.Y. 231, 236.
Camp. v. Hamlin, 55 Ga. 259.
Waples v Overaker, 77 Tex. 7, 13.
Ingram v. Wackernagel, 83 Iowa, 82.
Brownlee v. Bolton, 44 Mich. p. 221.
Penn v. Smith, 98 Ala. 560, 565.

(c) Dustan v. McAndrew, 44 N.Y. 72, 78.
Sawyer v. Dean, 114 N.Y. 469.
Whitney v. Boardman, 118 Mass. 242.
McLean v. Richardson, 127 Mass. 339.
Bagley v. Findlay, 82 Ill. 524, 526.
Roeblings' Co. v. Fence Co. 130 Ill. 660.

Rule 51.—(D.) WHERE THE SELLER EXPRESSLY RESERVES A RIGHT OF RE-SALE IN CASE THE BUYER SHOULD MAKE DEFAULT, AND ON THE BUYER MAKING DEFAULT, RE-SELLS THE GOODS, THE ORIGINAL CONTRACT OF SALE IS THEREBY RESCINDED, EXCEPT AS TO ANY CLAIM THE SELLER MAY HAVE FOR DAMAGES.

Lamond v. Davall, 9 Q.B. 1030, 1032.

And it seems that where the buyer refuses to take and pay for the goods the seller may elect to treat the contract as wholly executory; that is to say, he may keep the goods as his own and recover from the buyer damages for any loss occasioned by his breach of contract.

See Girard v. Taggart, 5 S. & R. p. 32.
Barr v. Logan, 5 Harrington, (Del.) p. 55.
Cook v. Brandeis, 3 Met. (Ky.) p. 557.
Dustan v. McAndrew, 44 N.Y. p. 78.
Van Brocklen v. Smeallie, 140 N.Y. p. 75.
Bagley v. Findlay, 82 Ill. p. 525.
Waples v. Overaker, 77 Tex. p. 11.
Putnam v. Glidden, 159 Mass. 47.

The refusal to take and pay for the goods may be construed as an offer to treat the contract as wholly executory, giving the seller an option to

consider the goods as his own and sue the buyer for not accepting and paying for them according to the contract.

In such case the damages would be the difference between the contract price and the actual value of the goods, which is generally determined by their market value at the time and place of delivery.

CHAPTER VI.

ACTIONS FOR BREACH OF THE CONTRACT

Remedies of the Seller.

Rule 52.—(A.) WHERE, UNDER A CONTRACT OF SALE, THE PROPERTY IN THE GOODS HAS PASSED TO THE BUYER, AND THE BUYER WRONGFULLY (1) NEGLECTS OR REFUSES TO PAY FOR THE GOODS ACCORDING TO THE TERMS OF THE CONTRACT, THE SELLER MAY MAINTAIN AN ACTION AGAINST HIM FOR THE PRICE OF THE GOODS (2).

1. Where the goods are sold on unconditional (*a*) credit, the seller cannot maintain an action for the price before the time of credit has expired (*b*).

But where by the contract the payment of the whole or part of the price is deferred, and the buyer is to give a bill or note for the deferred payment, but fails to do so, the seller may, before the expiration of the time of credit, maintain an action for damages for breach of the contract (*c*).

(*a*) See Nickson v. Jepson, 2 Starkie, 227.

Rugg v. Weir, 16 C.B. N.S. 471, 475.
Jaquith v. Adams, 60 Vt. 392, 394.
Wheeler v. Harrah, 14 Oregon, 325, 326.

(*b*) Dellone v. Hull, 47 Md. 112.
Keller v. Strasburger, 90 N.Y. 379.

(*c*) Mussen v. Price, 4 East, 147.
Paul v. Dod, 2 C.B. 800.
Girard v. Taggart, 5 S. & R. 19.
Rinehart v. Olwine, 5 W. & S. 157.
Hanna v. Mills, 21 Wend. 90.
Yale v. Coddington, 21 Wend. 175.
Nichols v. Steel Co. 137 N.Y. 471.
Hunneman v. Grafton, 10 Met. 454.
Hays v. Weatherman, 14 Ind. 341.
Carnahan v. Hughes, 108 Ind. 225.
Barron v. Mullin, 21 Minn. 374.
Manton v. Gammon, 7 Ill. App. 201.
Foster v. Adams, 60 Vt. 392.
Stephenson v. Repp, 47 Ohio, St. 551.

2. It is to be borne in mind that the term "sale" includes a bargain and sale as well as a sale and delivery.

Alexander v. Gardner, 1 Bing. N.C. 671.
Turley v. Bates, 2 H. & C. 200.
Doremus v. Howard, 23 N.J.L. 390, 392.
Wade v. Moffett, 21 Ill. 110.
Morse v. Sherman, 106 Mass. 430, 432.
Turner v. Langdon, 112 Mass. 265, 266.
Frazier v. Simmons, 139 Mass. 531, 535.

It seems that where the buyer contends that the goods are not his, and treats them as belonging to the seller, and the seller elects to keep them for the buyer and sue for the entire contract price, he cannot maintain a second suit for the expense of keeping the goods. If the seller wishes to avoid such expense, and at the same time to avail him-

self of the value of the goods, he may sell under an implied agency for the buyer, and sue for the balance above what he obtains after paying the reasonable expenses.

Putnam v. Glidden, 159 Mass. 47, 50.

And according to some authorities, the seller, upon a valid tender of goods in performance of an executory contract of sale, may treat the goods as belonging to the buyer and, declaring upon the contract, recover the full price as his measure of damages.

Bement v. Smith, 15 Wend. 493.
Hayden v. Demets, 53 N.Y. 426.
Shawhan v. Van Nest, 25 Ohio St. 490.
Smith Bros. v. Wheeler, 7 Oregon, 49.
Black River Lumber Co. v. Warner, 93 Mo. 374.

Rule 52.—(B.) WHERE, UNDER A CONTRACT OF SALE, THE PRICE IS PAYABLE ON A DAY CERTAIN IRRESPECTIVE OF DELIVERY, AND THE BUYER WRONGFULLY NEGLECTS OR REFUSES TO PAY SUCH PRICE, THE SELLER MAY MAINTAIN AN ACTION FOR THE PRICE, ALTHOUGH THE PROPERTY IN THE GOODS HAS NOT PASSED, AND THE GOODS HAVE NOT BEEN APPROPRIATED TO THE CONTRACT.

Dunlop v. Grote, 2 C. &. K. 153.

Rule 53.—(A) WHERE THE BUYER WRONGFULLY NEGLECTS OR REFUSES TO ACCEPT AND PAY FOR THE GOODS, THE SELLER MAY MAINTAIN AN ACTION AGAINST HIM FOR DAMAGES FOR NON-ACCEPTANCE.

Atkinson v. Bell, 8 B. & C. 277, 280.
Hague v. Porter, 3 Hill, 141, 143
Dillon v. Anderson, 43 N.Y. 231, 237.
Ganson v. Madigan, 15 Wis. 144.
Unexcelled Fire Works v. Polites, 130 Pa. St. 536.

Except where the price is payable irrespective of delivery (*a*), this is the seller's only remedy, where he is prevented by the buyer from performing an executory contract (*b*).

(*a*) See r 52 (B.)

(*b*) Allen v. Jarvis, 20 Conn. 49.
Hosmer v. Wilson, 7 Mich. 294, 303.
Scotten v. Sutter, 37 Mich. 526, 532.
Butler v. Butler, 77 N.Y. 472, 475.
James v. Adams, 16 W.Va. 245, 260.
Brand v. Henderson, 107 Ill. 141, 147.
Clause v. Printing Press Co. 118 Ill. 612, 617.
Thorn v. Danzinger, 50 Ill. App. 306.
Unexcelled Fire Works v. Polites, 130 Pa. St. 536.

Where goods are ordered of a manufacturer or dealer at a specified price and before the time for their completion or delivery has arrived, the order is countermanded, the manufacturer or dealer may treat the countermand as a legal prevention, and maintain an action for damages without completing or tendering the goods (*a*). In such case the difference between what would be the cost of manufacturing or supplying the goods and the

contract price is a proper element of damages (*b*). But the manufacturer or dealer has no right after such countermand to go on and make expenditures under the order and thereby increase the damages and then recover such increased damages (*c*).

(*a*) Cort v. Ry. Co. 17 Q.B. 127, 148.
Hosmer v. Wilson, 7 Mich. 294, 304.
McPherson v. Walker, 40 Ill. 371.
Hale v. Trout, 35 Cal. 229, 242.
Eckenrode v. Chemical Co. 55 Md. 51, 58.

(*b*) Masterton v. Mayor of Brooklyn, 7 Hill, 61.
Phila. etc. R.R. Co. v. Howard, 13 How. 307, 344.
United States v. Speed, 8 Wal. 77.
United States v. Behan, 110 Wal. 345.
Hinckley v. Steel Co. 121 U.S. 264, 275.
Hadley v. Prather, 64 Ind. 140.
Black River Lumber Co. v. Warner, 93 Mo. 374.
Muskegon, etc. Co. v. Mfg. Co. 135 Pa. St. 132.
Gallagher v. Whitney, 147 Pa. St. 184.

(*c*) Clark v. Marsiglia, 1 Denio, 317.
Dillon v. Anderson, 43 N.Y. 231.
Danforth v. Walker, 37 Vt. 239; S.C. 40 Vt. 257.
Collins v. Delaporte, 115 Mass. 162.
Moline Scale Co. v. Beed, 52 Iowa, 307.
Heaver v. Lanahan, 74 Md. 493.
Tufts v. Lawrence, 77 Tex. 526.
Davis v. Bronson, 2 N. Dak. 300.

Where there was a contract for the sale and delivery of goods at a specified time, and before that time the buyer notified the seller that he would not receive or pay for the goods, and thereupon the seller sold the goods to another party and brought an action for breach of the contract before the specified time for delivery, it was held that the seller was justified in treating the contract as broken, and that the buyer could not retract his renunciation of the contract after the

seller had acted upon it, and, by sale of the goods to another party, changed his position.

Windmuller v. Pope, 107 N.Y. 674.
See also James v. Adams, 16 W. Va. 245, 266.
Hocking v. Hamilton, 158 Pa. St. 107, 116.

"Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it."

Roeblings' Co. v. Fence Co. 130 Ill. 660, 666.
Kadish v. Young, 108 Ill. 170.
And see Lake Shore, etc. Ry. Co. v. Richards, 152 Ill. 59, 80.

Where the buyer before the time for delivery arrives repudiates the contract by notifying the seller that he will not accept and pay for the goods, he thereby gives the seller the option to rescind the contract (*a*). But if the seller elects to consider the contract in force, he cannot recover thereafter without performing all the conditions of the contract by him to be performed (*b*), or showing a legal excuse for non-performance (*c*).

(*a*) King v. Faist, 161 Mass. 449, 457.

(*b*) Foss Brewing Co. v. Bullock, 16 U.S. App. 311, 320.

(*c*) See Lake Shore, etc. Ry. Co. v. Richards. 152 Ill. 59, 80.

Rule 53.—(B.) THE MEASURE OF DAMAGES (1) IS THE ESTIMATED LOSS DIRECTLY AND NATURALLY RESULTING, IN THE ORDINARY COURSE OF EVENTS, FROM THE BUYER'S BREACH OF CONTRACT (2).

1. This is the rule as to general damages.

As to special damages see r 57.

As to damages for buyer's delay in taking delivery see r 40.

As to damages where the goods have been re-sold upon the buyer's refusal to take and pay for them, see r 51 (C).

2. Masterton v. Mayor of Brooklyn, 7 Hill, 61, 69.
Chicago v. Greer, 9 Wal. 726, 732.
United States v. Behan, 110 U.S. 338, 344.
Salvo v. Duncan, 49 Wis. 151, 156.
Dunkirk Colliery v. Lever, 9 Ch. D. p. 25.

As to loss of prospective profits see r 54 (B), n 2.

Rule 53.—(C.) WHERE THERE IS AN AVAILABLE MARKET (1) FOR THE GOODS IN QUESTION THE MEASURE OF DAMAGES IS PRIMA FACIE TO BE ASCERTAINED BY THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE MARKET OR CURRENT PRICE (2) AT THE TIME OR TIMES (3) WHEN THE GOODS OUGHT TO HAVE BEEN ACCEPTED (4), OR, IF NO TIME WAS FIXED FOR ACCEPTANCE, THEN AT THE TIME OF THE REFUSAL TO ACCEPT (5).

1. Where it is impracticable to show the market price at the precise time and place of delivery. evidence of the price for a brief period before or

after that time, and at places not distant, or in other controlling markets is competent, not for the purpose of establishing a market price at another time or place, but for the purpose of showing the real value at the time and place of delivery.

Cahen v. Platt, 69 N.Y. 348, 352.
McCormick v. Hamilton, 23 Grattan, 561.
Dwiggins v. Clark, 94 Ind. 56.
Ingram v. Wackernagel, 83 Iowa, 86.
Bump v. Cooper, 20 Oregon, 527.

And see r 54 (C), ns 1, 5.

2. The reason for the rule is that the seller in ordinary cases may take his goods into the market and obtain the market price for them.

Barrow v. Arnaud, 8 Q.B. p. 610.
Cahen v. Platt, 69 N.Y. p. 352.
Plumb v. Campbell, 129 Ill. p. 110.

3. *E.g.*, when the goods are deliverable by instalments.

Haines v. Tucker, 50 N.H. 307, 314.

4. Phillpotts v. Evans, 5 M. & W. 475.
Thompson v. Alger, 12 Met. p. 443.
Collins v. Delaporte, 115 Mass. p. 162.
Schramm v. Sugar Refining Co. 146 Mass. p. 216.
Cahen v. Platt, 69 N.Y. 348.
Windmuller v. Pope, 107 N.Y. 674.
Phelps v. McGee, 18 Ill. 155.
McNaught v. Dodson, 49 Ill. 446.
Burnham v. Roberts, 70 Ill. 19.
Rand v. R.R. Co. 40 N.H. 79.
Gordon v. Norris, 49 N.H. 376, 385.
Nixon v. Nixon, 21 Ohio St. 114.
Chapman v. Ingram, 30 Wis. 290.
Laubach v. Laubach, 73 Pa. St. p. 392.
Unexcelled Fire Works v. Polites, 130 Pa. St. 536.

Pittsburgh, etc. Ry. Co. v. Heck, 50 Ind. 303, 305.
Fell v. Muller, 78 Ind. 507, 512.
Tufts v. Grewer, 83 Me. 407.

Substantial damages are not recoverable for a refusal to accept the goods where they are worth the contract price in the open market.

Gibbons v. United States, 8 Wal. 269, 273.
Foos v. Sabin, 84 Ill. 564, 568.
Unexcelled Fire Works v. Polites, 130 Pa. St. 545.

And see r 54 (C), n 3.

5. Sanborn v. Benedict, 78 Ill. 309, 316.
Canda v. Wick, 100 N.Y. 127, 131.

Where delivery was withheld from time to time at the request of the buyer, upon final non-acceptance, the damages were estimated according to the market price at a reasonable time after the last request.

Hickman v. Haynes, L.R. 10 C.P. 598.

And see r 54 (C), n 7.

Remedies of the Buyer.

Rule 54.—(A.) WHERE THE SELLER WRONGFULLY NEGLECTS OR REFUSES TO DELIVER THE GOODS TO THE BUYER, THE BUYER MAY MAINTAIN AN ACTION AGAINST THE SELLER FOR DAMAGES FOR NON-DELIVERY.

This is the buyer's only remedy on the contract where the property in the goods has not passed to him under the contract.

Lester v. East, 49 Ind. 588.
Boutell v. Warne, 62 Mo. 350.
Columbus Construction Co. v. Crane Co. 9 U.S. App. 49.

And where, under an executory contract, the seller positively (*a*) notifies the buyer that he will not deliver the goods, or absolutely disables himself from delivering them, neither tender of the price nor averment and proof of the buyer's readiness and willingness to accept the goods and pay for them is necessary to sustain the action for damages (*b*).

(*a*) Dingley v. Oler, 117 U.S. p. 503.

(*b*) Crist v. Armour, 34 Barb. 378, 386.
Bunge v. Koop, 48 N.Y. 225.
Hawley v. Keeler, 53 N.Y. 114.
Woolner v. Hill, 93 N.Y. 576.
Wolf v. Willitts, 35 Ill. 88.
Follansbee v. Adams, 86 Ill. 13.
Parker v. Pettit, 43 N.J.L. 512, 516.
Lowe v. Harwood, 139 Mass. 133, 135.

Where, under a contract of sale, the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action for the conversion of the goods against the seller or any other person who has dealt with the goods under such circumstances as to amount to a conversion thereof (*a*). This, of course, is to be understood as subject to the rules for the protection of the unpaid seller (*b*) and innocent purchasers from the seller in possession after the sale (*c*).

(*a*) Chinery v. Viall, 5 H. & N. 288.
Kennedy v. Whitwell, 4 Pick. 466.
Philbrook v. Eaton, 134 Mass. 398.
Koon v. Brinkerhoff, 39 Hun, 130.

(*b*) See r 50.

(*c*) See r 28 (A).

Rule 54.—(B.) THE MEASURE OF DAMAGES (1) IS THE ESTIMATED LOSS DIRECTLY AND NATURALLY RESULTING, IN THE ORDINARY COURSE OF EVENTS, FROM THE SELLER'S BREACH OF CONTRACT (2).

1. This is the rule as to general damages.

As to special damages see r 57.

The rule also applies to damages for delay in delivering goods.

See cases cited in n 2.

2. Portman v. Middleton, 4 C.B. N S. 322, 328.
Cory v. Iron Works Co. L.R. 3 Q.B. 181, 190, 191.
Griffin v. Colver, 16 N.Y. 489, 495.
Rochester Lantern Co. v. Press Co. 135 N.Y. 209, 217.
Strawn v. Cogswell, 28 Ill. 457.
Benton v. Fay, 64 Ill. 417, 420.
Haskell v. Hunter, 23 Mich. 305.
Paine v. Sherwood, 21 Minn. 225, 232.
Hewson Supply Co. v. Brick Co. 55 Minn. 530.
Mihills Mfg. Co. v. Day, 50 Iowa, 250, 252.
Billmeyer v. Wagner, 91 Pa. St. 92.
Cockburn v. Lumber Co. 54 Wis. 619.
Camden Oil Co. v. Schlens, 59 Md. 31.
Howard v. Mfg. Co. 139 U.S. 199, 206.
Peace River Phosphate Co. v. Grafflin, 58 Fed. 550.
Central Trust Co. v. Mfg. Co. 77 Md. 202, 235.

Loss of profits can be allowed as damages for breach of contract where the loss is reasonably certain and can be directly traceable to the breach (*a*); as where the buyer has bargained for goods at less than the market price (*b*), or the seller knew that the purchase was made for the purpose of fulfilling another existing contract (*c*). But damages may be so remote as not to be directly traceable

to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. Mere speculative or conjectural profits, dependent on the chances of business or other contingencies, are incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages (*d*).

(*a*) See Wakeman v. Mfg. Co. 101 N.Y. 205, 209.
Somers v. Wright, 115 Mass. 292, 298.
Trigg v. Clay, 88 Va. 330, 335.

(*b*) Griffin v. Colver, 16 N.Y. p. 491.
Pennypacker v. Jones, 106 Pa. St. p. 242.

(*c*) Booth v. Rolling Mill Co. 60 N.Y. 487, 492.
Allis v. McLean, 48 Mich. p. 432.
Carpenter v. Nat. Bank, 119 Ill. p. 360.

(*d*) Griffin v. Colver, 16 N.Y. 489, 491.
Fox v. Harding, 7 Cush. 516, 522.
Pittsburg Coal Co. v. Foster, 59 Pa. St. 365, 370.
Pennypacker v. Jones, 106 Pa. St. 237, 242.
Benton v. Fay, 64 Ill. 417, 420.
Haven v. Wakefield, 39 Ill. 509.
Frazer v. Smith, 60 Ill. 145.
Hill v. Parsons, 110 Ill. 107.
McKinnon v. McEwan, 48 Mich. 106, 108.
Allis v. McLean, 48 Mich. 428, 431.
Reed Lumber Co. v. Lewis, 94 Ala. 626.
Moulthrop v. Hyett (Ala. 1895), 17 South. Rep. 32.
Love v. Ross (Iowa, 1893), 56 N.W. Rep. 528.

"It has been well settled since the decision in *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. In the language of the Supreme Judicial Court of Massa-

chusetts in *Fox v. Harding*, 7 Cush. p. 522: 'These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.' "

Western Union Tel. Co. v. Hall, 124 U. S. p. 454.

Rule 54.—(C.) WHERE THERE IS AN AVAILABLE MARKET (1) FOR THE GOODS IN QUESTION THE MEASURE OF DAMAGES IS PRIMA FACIE TO BE ASCERTAINED BY THE DIFFERENCE (2) BETWEEN THE CONTRACT PRICE (3) AND THE MARKET OR CURRENT PRICE OF THE GOODS (4) AT THE TIME (5) OR TIMES (6) WHEN THEY OUGHT TO HAVE BEEN DELIVERED, OR, IF NO TIME WAS FIXED, THEN AT THE TIME OF THE REFUSAL TO DELIVER (7).

1. The rule contemplates a fair market. The market price at the place for delivery is not the true and only criterion of the real value of the goods if such price was unnaturally inflated by a wrongful combination (*a*), or was wholly under the control of the seller (*b*).

(*a*) Kountz v. Kirkpatrick, 72 Pa. St. 376.

(*b*) Grand Tower Co. v. Phillips, 23 Wal. 471.

If there is no market at the place for delivery the buyer may show the price of such goods at the nearest available and controlling markets and the cost of transportation.

Grand Tower Co. v. Phillips, 23 Wal, 471.
Furlong v. Polleys, 30 Me. 491.
Rice v. Manley, 66 N.Y. 82.
Kitzinger v. Sanborn, 70 Ill. 149.
Capen v. Glass Co. 105 Ill. 185.
Johnson v. Allen, 78 Ala. 387.
Vickery v. McCormick, 117 Ind. 594.

And see r 53(C), n 1.

Where the exact sort of goods contracted for are not obtainable elsewhere, and it is reasonable for the buyer to purchase similar goods, it seems that the seller may be held for the difference in price.

Hinde v. Liddell, L.R. 10 Q.B. 265.
Tribune Co. v. Bradshaw, 20 Ill. App. p. 24.

It is the duty of the buyer to do all that he reasonably can to minimize the loss arising from the seller's breach of contract (*a*).

"The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent" (*b*).

And this duty is not relaxed because the delinquent seller affords the only opportunity for mitigating the loss. It was so held where the seller refused to deliver goods upon the stipulated credit, but offered them for cash at less than the contract price (*c*).

(*a*) **Parsons v. Sutton, 66 N.Y. 92, 98.**
Copper Co. v. Copper Mining Co. 33 Vt. 92.
Mfg. Co. v. Moore, 46 Kan. 324.

(*b*) **Warren v. Stoddart, 105 U.S, 224, 229.**
Long v. Smith, 15 Neb. 417, 420.
Hewson Supply Co. v. Brick Co. 55 Minn. 530, 535.

(*c*) **Lawrence v. Porter, 63 Fed. 62.**
Deere v. Lewis, 51 Ill. 254, 257.

2. In some of the states it is held that in order to put the buyer in as good a position as he would have been in if the contract had been performed he is entitled to interest on such difference from the time of the breach of the contract. Otherwise, he will not be fully indemnified (*a*). And where the contract price was paid by the buyer before default in the seller, the buyer is entitled to interest upon the whole market value of the goods from the time of default (*b*).

(*a*) **Thomas v. Wells, 140 Mass. 517, 521.**
Dana v. Fiedler, 12 N.Y. 40, 50.
Sleuter v. Wallbaum, 45 Ill. 43, 45.
Driggers v. Bell, 94 Ill. 223.
Plumb v. Campbell, 129 Ill. p. 110.
Minneapolis Works v. Bonnallie, 29 Minn. 373.
Gray v. Hall, 29 Kan. 704.
Ingram v. Wackernagel, 83 Iowa, 82.

(*b*) **Smith v. Dunlap, 12 Ill. 184, 194.**
Driggers v. Bell, 94 Ill. p. 224.
Rose v. Bozeman, 41 Ala. 678, 685.
Kountz v. Kirkpatrick, 72 Pa. St. p. 387.

3. The buyer can recover nominal damages whenever there has been a breach of the contract. But substantial damages are not recoverable where the market value is less than the contract price (*a*). Nor where the contract fixes no price, as the implied contract is to pay only what the

goods are reasonably worth, which, in general, is their market value (*b*).

(*a*) Bush v. Canfield, 2 Conn. 485, 487.
Fessler v. Love, 48 Pa. St. 407.
Deere v. Lewis, 51 Ill. 254.
Wire v. Foster, 62 Iowa, 114.
McGrath v. Gegner, 77 Md. 331.

And see r 53 (C), n 4.

(*b*) Trunkey v. Hedstrom, 131 Ill. 204.
McGrath v. Cannon (Minn. 1893), 57 N.W. Rep. 150.

4. The reason for the rule is that with such difference and the price he has agreed to pay the buyer may go into the market and supply himself with the same kind of goods at the market price

Dey v. Dox, 9 Wend. p. 135.
Barrow v. Arnaud, 8 Q.B. p. 609.
Deere v. Lewis, 51 Ill. p. 258.
Marsh v. McPherson, 105 U.S. p. 717.

But if the buyer supplies himself with such goods at a less cost than the market price, he can recover only for his actual loss. The rule of actual compensation for the loss resulting from non-delivery requires that the actual loss only should be allowed to be recovered.

Theiss v. Weiss, 166 Pa. St. 9.

5. Gainsford v. Carroll, 2 B. & C. 624.
Williams v. Reynolds, 6 B. & S. 495.
Shepherd v. Hampton, 3 Wheat. 200.
Shaw v. Nudd, 8 Pick. 9, 14.
Bartlett v. Blanchard, 13 Gray, 429.
Dana v. Fiedler, 12 N.Y. 40, 48.
Smethurst v. Woolston, 5 W. & S. 106.
Fessler v. Love, 48 Pa. St. 407.
Smith v. Dunlap, 12 Ill. 184, 192.
Sleuter v. Wallbaum, 45 Ill. 43.

Carpenter v. Nat. Bank, 119 Ill. p. 360.
Copper Co. v. Copper Mining Co. 33 Vt. 92.
Northrup. v. Cook, 39 Mo. 208.
Miles v. Miller, 12 Bush, 134.
Osgood v. Bauder, 75 Iowa, 550.
Rahm v. Deig, 121 Ind. 283.
Austrian v. Springer, 94 Mich. 343.

If no sales can be shown on the precise day, recourse may be had to sales before and after the day, and for that inquiry a reasonable range in point of time is allowable.

Dana v. Fiedler, 12 N.Y. 40, 49.
Douglas v. Merceles, 25 N.J. Eq. 144.
Kountz v. Kirkpatrick, 72 Pa. St. 376.

And see r 53 (C), n 1.

6. Where the goods are deliverable by successive instalments, the measure of damages is *prima facie* the sum of the differences between the contract price and the market prices at the several times for delivery.

Brown v. Muller, L.R. 7 Ex. 319.
Roper v. Johnson, L.R. 8 C.P. 167.
Shreve v. Brereton, 51 Pa. St. 175.
Long v. Conklin, 75 Ill. 32.
Summers v. Hibbard, 153 Ill. p. 111.
Johnson v. Allen, 78 Ala. 387, 392.
Hill v. Chipman, 59 Wis. 211, 219.
Hewson Supply Co. v. Brick Co. 55 Minn. 530.

7. Where no time is fixed for delivery the goods are deliverable in a reasonable time (*a*); and, in such case, the time of the refusal to deliver is generally taken as the time for the calculation of the damages (*b*).

(*a*) Blydenburgh v. Welsh, 1 Baldwin, 331, 338.
Thompson v. Woodruff, 7 Coldwell, 401, 412.
Kipp v. Wiles, 3 Sandf. 585.

(*b*) Shaw v. Holland, 15 M. & W. 136, 146.
McKnight v. Dunlop, 5 N.Y. 537, 544.
Williams v. Woods, 16 Md. 220, 259.
Chadwick v. Butler, 28 Mich. 349, 352.
Guice v. Crenshaw, 60 Tex. 344, 346.

If the time for delivery is postponed at the seller's request, the end of the postponement is taken as the time for the calculation of the damages.

Ogle v. Vane, L.R. 3 Q.B. 272.
Hill v. Smith, 34 Vt. 535, 547.
McDermid v. Redpath, 39 Mich. 372.
Roberts v. Benjamin, 124 U.S. 64, 72.
Summers v. Hibbard, 153 Ill. 102, 111.

And see r 53(C), n 5.

Rule 55.—WHERE AN ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO DELIVER SPECIFIC GOODS OF UNIQUE OR PECULIAR VALUE TO THE BUYER WOULD NOT AFFORD AN ADEQUATE COMPENSATION, A COURT OF EQUITY MAY ENTERTAIN JURISDICTION AND DECREE THAT THE CONTRACT SHALL BE SPECIFICALLY PERFORMED.

As where the subject matter of the contract is a valuable painting, vase or work of art; family pictures and furniture (*a*); articles which the seller alone can supply (*b*).

(*a*) Falcke v. Gray, 4 Drew. p. 658.
McGowin v. Remington, 12 Pa. St. p. 61.
Adams v. Messinger, 147 Mass. p. 188.

(*b*) **Buxton v. Cooper, 3 Atk. 383, 385.**
Equitable Gas Light Co. v. Mfg. Co. 63 Md. 285, 299.
Corbin v. Tracy, 34 Conn. 325, 328.
Hapgood v. Rosenstock, 23 Fed. 86, 87.
Adams v. Messinger, 147 Mass. 185, 189.

Rule 56.—(A.) WHERE THERE IS A BREACH OF WARRANTY (IN ITS STRICT SENSE) (1) BY THE SELLER, OR WHERE THE BUYER ELECTS (2), OR IS COMPELLED (3), TO TREAT ANY BREACH OF A CONDITION ON THE PART OF THE SELLER AS A BREACH OF WARRANTY, THE BUYER IS NOT BY REASON ONLY (4) OF SUCH BREACH OF WARRANTY ENTITLED TO REJECT THE GOODS (5); BUT HE MAY

(*a*) SET UP AGAINST THE SELLER THE BREACH OF WARRANTY IN DIMINUTION (6) OR EXTINCTION (7) OF THE PRICE; OR

(*b*) MAINTAIN AN ACTION (8) AGAINST THE SELLER FOR DAMAGES FOR THE BREACH OF WARRANTY (9).

1. See r 11 (B).

This rule does not apply to a condition in distinction from a warranty in the strict sense of the term. Thus it does not apply to an undertaking that the seller has a right to sell the goods; for this is really a condition, although frequently called a warranty of title.

See r 14.

In Massachusetts and several of the states it is held that a warranty accompanying a sale of spe-

cific goods may be treated by the buyer as a condition subsequent and the sale rescinded for the breach at his election.

Bryant v. Isburgh, 13 Gray, 607, 611.
Smith v. Hale, 158 Mass. 178, 183.
Franklin v. Long, 7 Gill & J. 407.
Marston v. Knight, 29 Me. 341.
Boothby v. Scales, 27 Wis. 626, 636.
Rogers v. Hanson, 35 Iowa, 283.
Upton Mfg. Co. v. Huiske, 69 Iowa, 557.
Mfg. Co. v. Stark, 45 Kan. 609.
Thompson v. Harvey, 86 Ala. 519.

2. When the subject matter of a contract of sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the buyer under the contract; because the existence of those qualities, being part of the description of the thing contracted for, becomes essential to its identity, and the buyer cannot be obliged to accept and pay for a thing different from that for which he contracted (*a*).

And when the buyer is entitled to reject the goods, and does so, he can recover the price, if he has paid it, for the consideration for its payment has wholly failed (*b*).

But when the thing offered under the contract is accepted by the buyer, the property therein passes to him, and the undertaking loses the character of a condition, or to speak more properly, ceases to be available as a condition, and becomes a mere warranty, viz.: a collateral stipulation for the breach of which a compensation must be sought in damages (*c*).

(a) Pope v. Allis, 115 U.S. 363, 371.
Furniture Co. v. School District, 158 Pa. St. 35, 44.

(b) Pope v. Allis, 115 U.S. 363.
Dallum v. Birdsall, 66 Ill. 378.
Lunt v. Wrenn, 113 Ill. p. 175.
And see Drennan v. Bunn, 124 Ill. p. 186.

(c) Behn v. Burness, 3 B. & S. p. 755.
Heilbutt v. Hickson, L.R. 7 C.P. p. 450.
Wolcott v. Mount, 36 N.J.L. p. 265.
Jones v. George, 61 Tex. p. 349.

3. In the case of an executory contract the buyer is not precluded from rejecting the goods by merely receiving them. He is entitled to a reasonable time for making an examination of the goods (*a*). But receipt will become acceptance if the buyer does not exercise the right of rejection within a reasonable time, or if he exercises any act of ownership over them, such as selling a part, or, if anything has been done by him to impair the position of the seller (*b*).

(a) See r 37 (A).

(b) See r 38.

4. There may be an express stipulation in the contract that the sale shall be null (*a*), or that the goods may be returned (*b*), if there is a breach of warranty. But unless the stipulation obligates (*c*) the buyer to return the goods or rescind the sale if they do not correspond with the warranty, the buyer may keep the goods and rely on the warranty (*d*).

(a) Bannerman v. White, 10 C.B.N.S. 844, 860.

(b) Dallum v. Birdsall, 66 Ill. 378.
Owens v. Sturges, 67 Ill. p. 367.
Pennell v. McAfferty, 84 Ill. 364.

(*c*) Hinchcliffe v. Barwick, 5 Ex. D. 177.
Hoover v. Doetsch, 45 Ill. App. 631.
McCormick v. Hartman, 35 Neb. 629, 631.

(*d*) Douglass Axe Co. v. Gardner, 10 Cush. 88.
Perrine v. Serrell, 30 N.J.L. 454.
McCormick v. Dunville, 36 Iowa, 645.
Hefner v. Haynes (Iowa, 1894), 57 N.W. Rep. 421.
Mandel v. Buttles, 21 Minn. 391.
Tunell v. Osborne, 31 Minn. 343.
Fitzpatrick v. Osborne, 50 Minn. 261.
Hull v. Belknap, 37 Mich. 179.
Seigworth v. Leffel, 76 Pa. St. 476.
Osborne v. McQueen, 67 Wis. 392, 398.
Shupe v. Collender, 56 Conn. 489.
Kemp v. Freeman, 42 Ill. App. 501.

If the warranty is false and fraudulent the buyer may rescind the contract for the fraud by restoring the goods within a reasonable time (*a*), or he may retain the goods and rely on the fraud in defence(*b*) or as a cause of action. (*c*)

(*a*) Murray v. Mann, 2 Exch. 538, 541
Perley v. Balch, 23 Pick. 283.
Voorhees v. Earl, 2 Hill, 288.
Frasure v. Zimmerly, 25 Ill. 202.
Owens v. Sturges, 67 Ill. p. 367.
Sparling v. Marks, 86 Ill. 125, 127.
Gates v. Bliss, 43 Vt. 299.
Matteson v. Holt, 45 Vt. 336.
Freyman v. Knecht, 78 Pa. St. p. 144.
Nelson v. Martin, 105 Pa. St. 229.
And see Dawson v. Pennaman, 65 Ga. 698.

(*b*) Whitney v. Allaire, 4 Denio, 554, 557.
Withers v. Greene, 9 How. 213, 227.
Dushane v. Benedict, 120 U.S. 630, 639.
Carey v. Guillow, 105 Mass. 18.
Herfort v. Cramer, 7 Colo. 483, 489.
Cavender v. Roberson, 33 Kan. 626.

(*c*) Clarke v. Dickson, E.B. & E. 148, 155.
Houldsworth v. Bank, 5 App. Cas. pp. 323, 338.

Heastings v. McGee, 66 Pa. St. 384, 386.
Marsh v. Webber, 16 Minn. 418, 420.
Miller v. Barber, 66 N.Y. 558, 564.

5. Street v. Blay, 2 B. & Ad. 456.
Gompertz v. Denton, 1 Cr. & M. 207.
Parson v. Sexton, 4 C.B. 899.
Dawson v. Collis, 10 C.B. 523.
Heilbutt v. Hickson, L.R. 7 C.P. p. 451.
Thornton v. Wynn, 12 Wheat. p. 193.
Kase v. John, 10 Watts, 107.
Freyman v. Knecht, 78 Pa. St. 141.
Voorhees v. Earl, 2 Hill, 288.
Muller v. Eno, 14 N.Y. 597.
Day v. Pool, 52 N.Y. p. 418.
Brigg v. Hilton, 99 N.Y. p. 529.
Allen v. Anderson, 3 Hump. 581.
Crabtree v. Kile, 21 Ill. 180.
Doane v. Dunham, 65 Ill. 512.
Owens v. Sturges, 67 Ill. 366.
Shields v. Reibe, 9 Ill. App. 598.
Skinner v. Mulligan, 56 Ill. App. 47.
Scranton v. Trading Co. 37 Conn. 130.
Matteson v. Holt, 45 Vt. 336.
Wright v. Davenport, 44 Tex. 164.
Marsh v. Low, 55 Ind. 271.
Hoover v. Sidener, 98 Ind. 290.
Merrick v. Wiltse, 37 Minn. p. 42.

The authorities proceed upon the ground that when the property in the goods has passed to the buyer he must then rely on the warranty, and can not by any subsequent act of his, without the concurrence of the seller, rescind the contract and revest the property in the seller (*a*).

And for that reason a notice of a defect in the goods, or an offer to return them, is not necessary (*b*).

(*a*) Crabtree v. Kile, 21 Ill. 180, 184.
Shields v. Reibe, 9 Ill. App. 598, 604.

(*b*) Ibid.
Kellogg v. Denslow, 14 Conn. 411.
Muller v. Eno, 14 N.Y. 597.
Day v. Pool, 52 N.Y. 416.
Vincent v. Leland, 100 Mass. 432.
Lewis v. Rountree, 78 N. Car. 323.
Eastern Ice Co. v. King, 86 Va. 97.
Hillenbrand v. Stockman, 123 Ind. 599.
Weed v. Dyer, 53 Ark. 155.

"If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods, or return them. If the contract is executory, and the goods yet to be manufactured (or ascertained), no title can pass until delivery or some equivalent act to which both parties assent, and when offered, the vendee may reject the goods as not answering the bargain, but if the (contract of) sale was with (express) warranty he may receive the goods and then the same consequences attach as in the former case, and among others, the right to compensation if the warranty is broken"(*a*).

Brigg v. Hilton, 99 N.Y. p. 529.
See also Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 264, 268.
Zabriskie v. R.R. Co. 131 N.Y. 72, 77, 78.
Morse v. Moore, 83 Me. 473, 488.
Central Trust Co. v. Mfg. Co. 77 Md. 202, 237.

"Each vendor makes virtually the same warranty (stipulation), and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract

agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified, and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty" (*b*).

Morse v. Moore, 83 Me. p. 480.

In the case of an executory contract, the law gives the buyer a reasonable time for making an examination of the goods; "and a failure to make the examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages" (*a*).

"If the buyer desires to rescind the contract and return the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; such right to rescind and return is waived by retaining and continuing to use the goods longer than is necessary for a trial of them" (*b*).

"Where goods are sold under an executory contract, there may be an acceptance of them in full discharge of the contract (including the warranty), or there may be an acceptance of them in such sense that the buyer retains and uses them and becomes vested with the title and ownership of them but reserves the right to claim damages for their defects (covered by the warranty)" (*c*).

(*a*) Underwood v. Wolf, 131 Ill. p. 437.

(*b*) Ibid. p. 441.

(*c*) Ibid. p. 442.

"The right to return goods purchased with a warranty before acceptance does not depend upon the contract of warranty or the rescission of the contract, in the absence of fraud, but upon the fact that the goods are not of the kind or quality contracted for. If the goods delivered are not of the kind contracted for, then the *real* contract has never become operative (*i.e.* as to specific goods), and the purchaser in such case may return the goods, if done within a reasonable time, on that ground. In so doing he does not rescind the contract. He may, notwithstanding such return, insist on the seller complying with it, and on failure to do so, may recover damages, or on the other hand, he may refuse to receive or accept other goods after such return (and after the agreed time for delivery), on the ground of the failure to comply with his contract, if the contract itself does not reserve to the seller such right of furnishing other goods under the contract and in compliance therewith. Until the seller delivers the kind of goods purchased, or the goods delivered are accepted by the buyer, the contract of purchase remains executory, and the contract of warranty remains in abeyance; for, primarily, the warranty only becomes vitalized so that an action may be maintained upon it, when the contract of sale becomes executed; that is, when there is an acceptance of the property, express or implied, by the buyer."

Mayes v. Rogers, 47 Ill. App. p. 375.

"An acceptance does no more than preclude the purchaser from rescinding the contract and returning the property."

Central Trust Co. v. Mfg. Co. 77 Md. p. 238.

6. The breach of the warranty may be given in evidence in mitigation of damages on the principle of avoiding circuity of action.

Street v. Blay, 2 B. & Ad. 456.
M'Allister v. Reab, 4 Wend. 483; S.C. 8 Wend. 109.
Judd v. Dennison, 10 Wend. 513.
Muller v. Eno, 14 N.Y. 597.
Harrington v. Stratton, 22 Pick. 510.
Goodwin v. Morse, 9 Met. 278.
Bradley v. Rea, 14 Allen, 20.
Dailey v. Green, 15 Pa. St. 127.
Seigworth v. Leffel, 76 Pa. St. 476.
Ogden v. Beatty, 137 Pa. St. 197.
Lyon v. Bertram, 20 How. p. 155.
Babcock v. Trice, 18 Ill. 420.
Mears v. Nichols, 41 Ill. 207.
Hutt v. Bruckman, 55 Ill. 441.
McClure v. Williams, 65 Ill. 390.
Murray v. Carlin, 67 Ill. 286.
Wilson v. King, 83 Ill. 232.
Ruff v. Jarrett, 94 Ill. 475.
Underwood v. Wolf, 131 Ill. 425.
Hitchcock v. Hunt, 28 Conn. 343.
Bouker v. Randles, 31 N.J.L. 335.
Walker v. Hoisington, 43 Vt. 608.
Polhemus v. Heiman, 45 Cal. 573.
Dayton v. Hooglund, 39 Ohio St. 671.
Hayden v. Houghton (Tex. Civ. App. 1894), 24 S.W. Rep. 803.
Houchins v. Williams (Tex. Civ. App. 1894), 25 S.W. Rep. 730.

"The acceptance of goods under an executory contract, with opportunity of inspection at the time of delivery, *without complaint*, may raise a pre-

sumption that they were of the quality contemplated by the parties; but it will not preclude the party from showing and setting up the actual defect in quality and condition."

Babcock v. Trice, 18 Ill. p. 421.
Underwood v. Wolf, 131 Ill. p. 436.
Polhemus v. Heiman, 45 Cal. p. 579.
Morse v. Moore, 83 Me. p. 481.
Eastern Ice Co. v. King, 86 Va. p. 102.

"There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods; but the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty, and that, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counter claim for such damages in an action brought by the vendor for the purchase price of the goods."

English v. Spokane Com. Co. 15 U.S. App. p. 226.
See also Babcock v. Trice, 18 Ill. 420.
Underwood v. Wolf, 131 Ill. 425, 435.
Polhemus v. Heiman, 45 Cal. 573, 579.

Dayton v. Hooglund, 39 Ohio St. 671, 682.
Hege v. Newsom, 96 Ind. 431.
Best v. Flint, 58 Vt. 543, 547.
Eagan Co. v. Johnson, 82 Ala. 233, 238.
Holloway & Jacoby, 120 Pa. St. 583, 589.
Tacoma Coal Co. v. Bradley, 2 Wash. 600
Weed v. Dyer, 53 Ark. 155, 159.
Morse v. Moore, 83 Me. 473, 479.
Central Trust Co. v. Mfg. Co. 77 Md. 202, 237.
And see Breen v. Moran, 51 Minn. 525, 530.

In New York the court maintained for a long time the theory (now abandoned) (*a*) that description of quality accompanying a sale is not a warranty of quality. But that court still seems to make a distinction in executory contracts as to the effect of acceptance of goods where the only stipulation as to their quality is that implied from a particular description.

Thus, on the one hand, it is said that in cases of executory contracts for the sale "of goods of a particular description, where the quality of goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted and no warranty (other than that implied from the description) attends the (contract) of sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract" (*b*).

And, on the other hand it is held "that upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection" (*c*).

"When there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale" (*d*).

(*a*) White v. Miller, 71 N.Y. p. 129.

(*b*) Zabriskie v. R.R. Co. 131 N.Y. 78.
Coplay Iron Co. v. Pope, 108 N.Y. 232.
Studer v. Bleistein, 115 N.Y. 316.
Pierson v. Crooks, 115 N.Y. 539.

(*c*) Zabriskie v. R.R. Co. 131 N.Y. 72, 77.
Brigg v. Hilton, 99 N.Y. 517, 529.
Kent v. Friedman, 101 N.Y. 616.

(*d*) Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 268.
Day v. Pool, 52 N.Y. 416.
Parks v. Ax and Tool Co. 54 N.Y. 586.
Dounce v. Dow, 57 N.Y. 16.

In Wisconsin it is held that "where the purchaser of goods delivered on an executory contract, with full knowledge, or with full opportunity for examination and knowledge, of their defects, which are open and apparent upon mere inspection, takes them into his possession and appropriates them to his own use without notifying the vendor at the time of receiving them, or within a reasonable time thereafter, that they are not accepted as fulfilling the contract, he cannot recoup damages for such defects or failures in an action for the contract price."

McClure v. Jefferson, 85 Wis. 208, 213.

7. As where the goods are of no value.

Poulton v. Lattimore, 9 B. & C. 259, 265.
Welch v. Hoyt, 24 Ill. 117.
Mears v. Nichols, 41 Ill. p. 213.

Shields v. Reibe, 9 Ill. App. 598, 604.
Gibbs, etc. Mfg. Co. v. Kaszezyki, 18 Ill. App. 623, 627.
Brown v. Reinholdt, 41 Ill. App. 599.
Murphy v. Gay, 37 Mo. 535.
Compton v. Parsons. 76 Mo. 455.
French v. Gordon, 10 Kan. 370.
Dill v. O'Ferrell, 45 Ind. 268.
Pacific Guano Co. v. Mullen, 66 Ala. 582.
Mfg. Co. v. Wood, 84 Mich. 452.

8. Kellogg v. Denslow, 14 Conn. 411.
Douglass Axe Co. v. Gardner, 10 Cush. 88.
Vincent v. Leland, 100 Mass. 432.
Day v. Pool, 52 N.Y. 416.
Kent v. Friedman, 101 N.Y. 616.
Smeltzer v. White, 92 U.S. 395.
Richardson v. Grandy, 49 Vt. 22.
Lewis v. Rountree, 78 N. Car. 323.
Hughes v. Bray, 60 Cal. 284.
Holloway v. Jacoby, 120 Pa. St. 583.
Eastern Ice Co. v. King, 86 Va. 97.

The buyer, if sued for the price in a court of record (*a*), is not bound to set up the breach of warranty, but may pay in full (*b*), or allow judgment to be taken (*c*), and then sue for damages.

(*a*) See Rev. St. Ill. ch. 79, § 49.

(*b*) Davis v. Hedges, L.R. 6 Q.B. 687, 690.
Cook v. Moseley, 13 Wend. 277, 279.

(*c*) Bodurtha v. Phelon, 13 Gray, 413, 414.
Gilmore v. Williams, 162 Mass. 351.
Thoreson v. Harvester Works, 29 Minn. 341.
Volland v. Baker, 32 Neb. 391.

The buyer may resort to an action for breach of warranty although he has given his promissory note for the price, which is still unpaid.

Applebee v. Rumery, 28 Ill. 280.
Frohreich v. Gammon, 28 Minn. 476.

Fitzpatrick v. Osborne, 50 Minn. 261.
See also Aultman v. Wheeler, 49 Iowa, 647.
Bretz v. Fawcett, 29 Ill. App. 319.
Wheelock v. Berkeley, 138 Ill. 153.

9. In England the fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

Mondel v. Steel, 8 M. & W. 858.
Rigge v. Burbidge, 15 M. & W. p. 600.

In many of the states, by statutes or otherwise, the buyer is permitted, by way of counterclaim or setoff, to avail himself of all his damages for breach of the warranty, and thus not only to defeat the seller's claim, in whole or in part, but also to recover an affirmative judgment against him.

Cook v. Castner, 9 Cush. 266, 277.
Star Glass Co. v. Morey, 108 Mass. 573.
Love v. Oldham, 22 Ind. 51.
Brigg v. Hilton, 99 N.Y. 517, 527.
Fairbank Canning Co. v. Metzger, 118 N.Y. 260.
Zabriskie v. R.R. Co. 131 N.Y. 72.
Weaver v. Penny, 17 Ill. App. 628.
Underwood v. Wolf, 131 Ill. 425.
Dushane v. Benedict, 120 U.S. 630, 648.
Harvester Works v. Bonnallie, 29 Minn. 373.

Rule 56.—(B.) THE MEASURE OF DAMAGES (1) FOR BREACH OF WARRANTY IS THE ESTIMATED LOSS DIRECTLY AND NATURALLY RESULTING, IN THE ORDINARY COURSE OF EVENTS, FROM THE BREACH OF WARRANTY (2).

1. This is the rule as to general damages.

As to special damages see r 57, n 2.

2. Randall v. Raper, E.B. & E. 84.
Randall v. Newson, 2 Q.B.D. 102, 111.
Packard v. Slack, 32 Vt. 9, 12.
Passinger v. Thorburn, 34 N.Y. 634.
Cassidy v. Le Fevre, 45 N.Y. 562, 566.
Parks v. Ax and Tool Co. 54 N.Y. 586, 592.
Dushane v. Benedict, 120 U.S. 630, 636.
Crabtree v. Kile, 21 Ill. 180.
Phelan v. Andrews, 52 Ill. 486.
Hodgman v. R.R. Co. 45 Ill. App. 395.
Huyett, etc. Mfg. Co. v. Saile, 45 Ill. App. 562.
McCormick v. Vanatta, 43 Iowa, 389.
Aultman v. Stout, 15 Neb. 586.
Wilson v. Reedy, 32 Minn. 256; S.C. 33 Minn. 503.
Shaw v. Smith 45 Kan. 334.
Peak v. Frost, 162 Mass. 298.
Alpha Mills v. Steam Engine Co. (N. Car. 1895), 21 S. E. Rep. 917.

Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the buyer's damages is what it would cost to supply the deficiency.

Marsh v. McPherson, 105 U.S. 709, 718.
Benjamin v. Hillard, 23 How. 149, 167.
Butler v. Steamship Co. 130 U.S. 527.
Brown v. Foster, 51 Pa. St. 165.
Cassidy v. Le Fevre, 45 N.Y. 566.
Wheeler Mfg. Co. v. Thompson, 33 Kan. 491, 494.
Frick Co. v. Falk, 50 Kan. 644, 647.
Fitzpatrick v. Osborne, 50 Minn. 263.
Central Trust Co. v. Mfg. Co. 77 Md. 238.
And see Pennypacker v. Jones, 106 Pa. St. 237.

Rule 56.—(C.) IN THE CASE OF BREACH OF WARRANTY OF QUALITY SUCH LOSS IS PRIMA FACIE THE DIFFERENCE BETWEEN THE VALUE OF THE GOODS AT THE TIME OF DELIVERY TO THE BUYER AND THE VALUE THEY WOULD HAVE HAD IF THEY HAD ANSWERED TO THE WARRANTY.

Loder v. Kekulé, 3 C.B.N.S. 128.
Jones v. Just, L.R. 3 Q.B. 197.
Cary v. Gruman, 4 Hill, 625.
Muller v. Eno, 14 N.Y. 597.
Hoe v. Sanborn, 36 N.Y. 98.
Reggio v. Braggiotti, 7 Cush. 166, 169.
Tuttle v. Brown, 4 Gray, 457, 460.
Brown v. Bigelow, 10 Allen, 242.
Morse v. Brackett, 98 Mass. 210.
Cothers v. Keever, 4 Pa. St. 168.
Seigworth v. Leffel, 76 Pa. St. 476.
Himes v. Kiehl, 154 Pa. St. 190.
Fisk v. Hicks, 31 N.H. 538.
Woodworth v. Woodburn, 20 Ill. 184.
McClure v. Williams, 65 Ill. 390.
Wheelock v. Berkeley, 138 Ill. 153.
Rutan v. Ludlam, 29 N.J.L. 398.
Murry v. Meredith, 25 Ark. 164.
Street v. Chapman, 29 Ind. 142.
Central Trust Co. v. Mfg. Co. 77 Md. 202, 238.
Scranton v. Trading Co. 37 Conn. 130.
Herring v. Skaggs, 62 Ala. 180.
Case Machine Co. v. Haven, 65 Iowa, 361.
Douglass v. Moses (Iowa, 1893), 56 N.W. Rep. 271.
Merrick v. Wiltse, 37 Minn. 41.
Eastern Ice Co. v. King, 86 Va. 97.
English v. Spokane Com. Co. 15 U.S. App. 218.

The recovery of such difference will generally put the buyer in as good a position as he would have been in if the warranty had been fulfilled

And if the buyer got the goods at a low price he is entitled to the benefit of his bargain (*a*).

The contract price affords *prima facie*, not conclusive, evidence of the value of the goods if they had been as warranted (*b*).

But the application of the rule is not changed or modified by the fact that the buyer has re-sold the goods for the same or even a greater price than that which he paid for them (*c*).

(*a*) Cothers v. Keever, 4 Pa. St. 168.
Wallace v. Wren, 32 Ill. 151.
Scranton v. Trading Co. 37 Conn. 135

(*b*) Cary v. Gruman, 4 Hill, 625.
Lane v. Lantz, 27 Md. 211.
Street v. Chapman, 29 Ind. 142.
Houghton v. Carpenter, 40 Vt. 588.
Seigworth v. Leffel, 76 Pa. St. 476.
Aultman v. Hetherington, 42 Wis. 622.
Minneapolis Works v. Bonnallie, 29 Minn. 373.
Woody v. Bennett, 88 Cal. 241.

(*c*) Brown v. Bigelow, 10 Allen, 242.
Muller v. Eno, 14 N.Y. 597.
Atkins v. Cobb, 56 Ga. 86.
Brock v. Clark, 60 Vt. 551.
Wheelock v. Berkeley, 138 Ill. 153.
Hogan v. Shuart, 11 Mont. 498.
Case Plow Works v. Niles (Wis. 1895), 63 N.W. Rep 1013.

As to loss of profits see r 54 (B), n 2.

As to damages for breach of condition or warranty of title see:

Armstrong v. Percy, 5 Wend. 539.
Rowland v. Shelton, 25 Ala. 217.
Brown v. Woods, 3 Coldwell, 182.
Grose v. Hennessey, 13 Allen, 389.
Brown v. Pierce, 97 Mass. 46.
Hoffman v. Chamberlain, 40 N.J. Eq. 663.

Where there is a warranty against incumbrance the buyer may discharge the incumbrance and de-

duct the amount from the unpaid balance of the purchase price.

Harper v. Dotson, 43 Iowa, 232.

As to damages for breach of condition or warranty of title where the superior right or interest has not been asserted see r 14, n 5.

Rule 57.—NONE OF THE RULES OF THIS WORK AFFECT THE RIGHT OF THE BUYER OR THE SELLER TO RECOVER INTEREST OR SPECIAL DAMAGES IN ANY CASE WHERE BY LAW INTEREST (1) OR SPECIAL DAMAGES (2) MAY BE RECOVERABLE, OR TO RECOVER MONEY PAID WHERE THE CONSIDERATION FOR THE PAYMENT OF IT HAS FAILED (3).

1 See r 54(C), n 2.

See also Rev. St. Ill. Ch. 74, § 2.

2. Where the goods in question are bought for a special purpose known to the seller, and such goods cannot be seasonably (*a*) obtained therefor in the market, the measure of damages is the estimated loss, directly and naturally resulting under such circumstances from the seller's breach of contract. In such cases the damages are what a reasonable man with a common knowledge of the parties would contemplate as a probable consequence of the breach under such circumstances if he applied his mind to it (*b*).

(*a*) Richardson v. Chynoweth, 26 Wis. 656, 659.
Berkey Furniture Co. v. Hascali, 123 Ind. 502.

(*b*) Cory v. Iron Works Co. L.R. 3 Q.B. 181, 188, 190.
Hammond v. Bussey, 20 Q.B.D. 79, 100.
Leonard v. Telegraph Co. 41 N.Y. 544, 567.
Booth v. Rolling Mill Co. 60 N.Y. 487, 492.
Whitehead v. Ryder, 139 Mass. 366, 371.
Abbott v. Hapgood, 150 Mass. 248, 254.
Van Winkle v. Wilkins, 81 Ga. 93.
Short v. Matteson, 81 Iowa, 638, 640.
McHose v. Fulmer, 73 Pa. St. 367.
Carroll, etc. Co. v. Machine Co. 3 U.S. App. 631.

For cases where the damages under the pleadings were held to be too remote and not within the contemplation of the parties see:

Herring v. Skaggs, 62 Ala. 180, 188.
Jones v. Ross, 98 Ala. 448.
Case v. Stevens, 137 Mass. 553.
Frohreich v. Gammon, 28 Minn. 476, 482.
Wilson v. Reedy, 32 Minn. 256.
Aultman v. Stout, 15 Neb. 592.
Sutherland v. Round, 16 U.S. App. 30.

The seller cannot be charged with special damages unless, when he entered into the contract, he had notice of the special circumstances which made the special loss the likely result of the breach in the ordinary course of events (*a*). And the special damages must be set forth in the declaration or complaint (*b*).

(*a*) Portman v. Middleton, 4 C.B. N.S. 322, 329.
Bartlett v. Blanchard, 13 Gray, 429.
Copper Co. v. Copper Mining Co. 33 Vt. 92.
Fessler v. Love, 48 Pa. St. 407.
Billmeyer v. Wagner, 91 Pa. St. 92.
Paine v. Sherwood, 19 Minn. 325.
Mihills Mfg. Co. v. Day, 50 Iowa, 252.
Wetmore v. Pattison, 45 Mich. 439.
Buffalo Wire Co. v. Phillips, 64 Wis. 338.
Goodkind v. Rogan, 8 Ill. App. 413.

Carpenter v. Nat. Bank, 119 Ill. p. 361.
Rahm v. Deig, 121 Ind. 283, 289.

(*b*) Stevens v. Lyford, 7 N.H. 360.
Furlong v. Polleys, 30 Me. 491.
Parsons v. Sutton, 66 N.Y. 92.
Chicago, etc. R.R. Co. v. Hale, 83 Ill. p. 364.
Myer v. Davies, 17 Ill. App. 228.
Koch v. Merk, 48 Ill. App. 26.
Mfg. Co. v. Gray, 111 N. Car. 92.
Lawrence v. Porter, 63 Fed. 62.

Where the goods were bought for a special purpose known to the seller, special damages for breach of contract were allowed in the following cases:

Guano bought for use by the buyer in raising a cotton crop on his plantation (*a*).

An article known as "Paris green" bought for use in destroying cotton worms (*b*).

Ice bought by a butcher for use in preserving fresh meat (*c*).

A refrigerator bought for the purpose of storing meats (*d*).

Goods bought for the purpose of fulfilling another existing contract (*e*).

(*a*) Bell v. Reynolds, 78 Ala. 511.

(*b*) Jones v. George, 61 Tex. 345.

(*c*) Hammer v. Schoenfelder, 47 Wis. 455.

(*d*) Ford v. Refrigerating Co. 40 Ill. App. 222.

(*e*) Hydraulic Co. v. McHaffie, 4 Q.B.D, 670, 677.
Grebert-Borgnis v. Nugent, 15 Q.B.D. 85.
Messmore v. Shot Co. 40 N.Y. 422.
Booth v. Rolling Mill Co. 60 N.Y. 487.
Thorne v. McVeagh, 75 Ill. 81.
Carpenter v. Nat. Bank, 119 Ill. p. 360.
Stewart v. Power, 12 Kan. 596.
Robinson v. Hyer (Fla. 1895), 17 South. Rep. 745.

On the same principle special damages for delay in delivering the goods bought were allowed in the following cases:

Steam engine and machine for threshing wheat in the field (*a*).

Steam engine for driving a planing mill and other machinery (*b*).

Coal to be delivered at the buyer's cost during the summer months (*c*).

Brick of a particular kind for a sewer in process of construction (*d*).

Lumber of a peculiar character for buildings in process of erection (*e*).

(*a*) Smeed v. Foord, 1 E. & E. 602.

(*b*) Griffin v. Colver, 16 N.Y. 490.

(*c*) Merrimack Co. v. Quintard, 107 Mass. 127.

(*d*) Ramsey v. Tully, 12 Ill. App. 463.

(*e*) Lumber Co. v. Sutton, 46 Kan. 192.

In the case of a machine warranted to be fit for a special purpose the expenses incurred by the buyer in a reasonable (*a*) attempt to adapt it to such purpose can be recovered (*b*).

(*a*) See Aultman v. Stout, 15 Neb. 592.

(*b*) Whitehead v. Ryder, 139 Mass. 366.
Phelan v. Andrews, 52 Ill. 486.
Melby v. Osborn, 33 Minn. 492.
McLennan v. Ohmen, 75 Cal. 558.

And so special damages for breach of warranty were allowed in the following cases:

Warranted carriage springs bought for use in the construction of carriages (*a*).

Coal dust, warranted to be free from soft dust bought for use in the manufacture of brick (*b*).

Warranted steam boiler bought for use in running a mill (*c*).

Seed warranted to be of a certain kind or quality bought for the purpose of planting and raising a crop (*d*).

Warranted goods bought for the purpose of fulfilling another contract (*e*).

Horse, warranted to be safe and not afraid of the cars, bought by a woman for her own personal use (*f*).

Warranted refrigerator bought for immediate use in the freezing and preservation of chickens for the May market following (*g*).

Material warranted to be pure and harmless bought for coloring ice cream (*h*).

Machine warranted to be of a certain capacity bought for rolling and bending sheets of iron (*i*).

(*a*) Thoms v. Dingley, 70 Me. 100.

(*b*) Milburn v. Belloni, 39 N.Y. 53.

(*c*) Phelan v. Andrews, 52 Ill. 486.
Page v. Ford, 12 Ind. 46.
Sinker v. Kidder, 123 Ind. 528.

(*d*) Passinger v. Thorburn, 34 N.Y. 634.
Van Wyck v. Allen, 69 N.Y. 61.
White v. Miller, 71 N.Y. 118; S.C. 78; N.Y. 393.
Flick v. Wetherbee, 20 Wis. 392.
Wolcott v. Mount, 36 N.J.L. 262; S.C. 38 N.J.L. 496.
See also Butler v. Moore, 68 Ga. 780.
Ferris v. Ferre, 33 Conn. 513.

(*e*) Thorne v. McVeagh, 75 Ill. 81.
Snow v. Schomacker Co. 69 Ala. 111.

(*f*) Allen v. Truesdell, 135 Mass. 75.

(*g*) Beeman v. Banta, 118 N.Y. 538.

(*h*) Swain v. Schieffelin, 134 N.Y. 471.

(*i*) Carroll, etc. Co. v. Machine Co. 3 U.S. App. 631.

See also where the seller was aware that an animal warranted to be free from an infectious disease would probably be placed with other animals.

Smith v. Green, 1 C.P.D. 92.
Packard v. Slack, 32 Vt. 9.
Bradley v. Rea, 14 Allen, 20.
Marsh v. Webber, 16 Minn. 418.
Long v. Smith, 15 Neb. 418.
Dushane v. Benedict, 120 U.S. p. 637.
Joy v. Bitzer, 77 Iowa, 73.
And see Jeffrey v. Bigelow, 13 Wend. 518.
Faris v. Lewis, 2 B. Mon. 375.
Wintz v. Morrison, 17 Tex. 372.
Rose v. Wallace, 11 Ind. 112.

3. Total failure of consideration.

Eichholz v. Bannister, 17 C.B.N.S. 708.
Nash v. Towne, 5 Wal. 689.
Pope v. Allis, 115 U.S. 363.
Dalton v. Bentley, 15 Ill. p. 420.
Howe Machine Co. v. Willie, 85 Ill. 333.
Cleveland v. Sterrett, 70 Pa. St. 204.
Petersen v. Lumber Co. 51 Mich. 86.
Mabry v. Harp, 53 Kan. 401.

Partial failure of consideration.

Devaux v. Conolly, 8 C.B. 640.
Wheadon v. Olds, 20 Wend. 174.
Hill v. Rewee, 11 Met. 268.
Devine v. Edwards, 87 Ill. 177; S.C. 101 Ill. 138.

CHAPTER VII.

SUPPLEMENTARY.

Rule 58.—WHERE ANY RIGHT, DUTY, OR LIABILITY WOULD ARISE UNDER A CONTRACT OF SALE, BY IMPLICATION OF LAW, IT MAY BE NEGATIVED OR VARIED BY EXPRESS AGREEMENT (1) OR BY THE COURSE OF DEALING BETWEEN THE PARTIES (2), OR BY USAGE, IF THE USAGE BE SUCH AS TO BIND BOTH PARTIES TO THE CONTRACT (3).

1. "Merchants are not bound to make their contracts according to any rule of law."

Honck v. Muller, 7 Q.B.D. p. 103.
And see Ward v. Hobbs, 4 App. Cas. 13.

2. Whitworth v. Ry. Co. 87 N.Y. 413, 420.
McLaughlin v. Marston, 78 Wis. 670, 677.
Peirson v. Duncan, 162 Pa. St. 187.
Kahn v. Cook, 22 Ill. App. 562.

3. The usage to bind both parties must be known to both (*a*), or be so general and notorious as to be taken to be known to both (*b*).

(*a*) See Robinson v. Mollett, L.R. 7 H.L. 802.
Walls v. Bailey, 49 N.Y. 464.
Nonotuck Silk Co. v. Fair, 112 Mass. 354.
Corcoran v. Chess, 131 Pa. St. 356.
Barnard v. Kellogg, 10 Wal. 383.
Chateaugay Iron Co. v. Blake, 144 U.S. 476.

(*b*) See Robinson v. United States, 13 Wal. 363, 366.
Clark v. Baker, 11 Met. 186, 188.
Porter v. Hills, 114 Mass. 106.
Carter v. Coal Co. 77 Pa. St. 286.
Doane v. Dunham, 79 Ill. 131.
Lyon v. Culbertson, 83 Ill. 33.
Bailey v. Bensley, 87 Ill. 556.
Samuels v. Oliver, 130 Ill. 73.
Wadley v. Davis, 63 Barb. 500, 503.
Robertson v. N.S. Co. 139 N.Y. 416, 421.
Austrian v. Springer, 94 Mich. 343, 351.
Smith v. Phipps (Conn. 1894), 32 Atl. Rep. 367.

And see rs. 18 (E); 33 (B), n 2; 45 (A), n 1.

Rule 59.—IN THE CASE OF A SALE BY AUCTION.—(A.) WHERE GOODS ARE PUT UP FOR SALE BY AUCTION IN LOTS, EACH LOT IS PRIMA FACIE DEEMED TO BE THE SUBJECT OF A SEPARATE CONTRACT OF SALE:

Emmerson v. Heelis, 2 Taunt. 38.
Roots v. Dormer, 4 B. & Ad. 77.
Van Eps v. Schenectady, 12 Johns. 436.
Wells v. Day, 124 Mass. 38.

Rule 59.—(B.) A SALE BY AUCTION IS COMPLETE WHEN THE AUCTIONEER ANNOUNCES ITS COMPLETION BY THE FALL OF THE HAMMER, OR IN OTHER CUSTOMARY MANNER (1). UNTIL SUCH ANNOUNCEMENT IS MADE ANY BIDDER MAY RETRACT HIS BID (2).

1. Chamberlain v. Bain, 27 Ill. App. 634.
   Lucas v. Wallace, 42 Ill. App. 172.

2. Payne v. Cave, 3 T.R. 148.
   Warlow v. Harrison, 1 E. & E. p. 307.
   Fisher v. Seltzer, 23 Pa. St. 308.
   Grotenkemper v. Achtermeyer, 11 Bush, 222.

Rule 59.—(C.) WHERE A SALE BY AUCTION IS NOT NOTIFIED TO BE SUBJECT TO A RESERVED PRICE(1), OR A RIGHT TO BID ON BEHALF OF THE SELLER, IT IS NOT LAWFUL FOR THE SELLER TO BID HIMSELF OR TO EMPLOY ANY PERSON TO BID AT SUCH SALE. ANY SALE CONTRAVENING THIS RULE MAY BE TREATED AS FRAUDULENT BY THE BUYER (2).

See Howard v. Castle, 6 T.R. p. 645.
Mortimer v. Bell, L.R. 1 Ch. App. p. 14.
Veazie v. Williams, 8 How. p. 153.
Staines v. Shore, 16 Pa. St. p. 204.
Nat. Bank v. Sprague, 20 N.J. Eq. p. 165.

2. Bexwell v. Christie, Cowp. 396.
   Green v. Baverstock, 14 C.B. N.S. 204.
   Veazie v. Williams, 8 How. 134.
   Pennock's Appeal, 14 Pa. St. 446.
   Staines v. Shore, 16 Pa. St. 200.

Towle v. Leavitt, 23 N.H. 360.
Miller v. Baynard, 2 Houston, 559.
Fisher v. Hersey, 17 Hun, 370.
Peck v. List, 23 W. Va. 338.
Springer v. Kleinsorge, 83 Mo. 152.
And see Thornett v. Haines, 15 M. & W. 367.
Curtis v. Aspinwall, 114 Mass. 187.

As to combinations to suppress competition at sales by auction:

See Benjamin, Principles of Contract, 95.

Rule 60.—(A.) CAPACITY TO BUY AND SELL IS REGULATED BY THE GENERAL LAW CONCERNING CAPACITY TO CONTRACT, AND TO TRANSFER AND ACQUIRE PROPERTY (1).

PROVIDED THAT WHERE NECESSARIES (2) ARE SOLD AND DELIVERED TO A MINOR (3) OR TO A PERSON WHO BY REASON OF MENTAL INCAPACITY (4) OR DRUNKENNESS (5) IS INCOMPETENT TO CONTRACT, HE MUST PAY A REASONABLE PRICE THEREFOR.

1. See Benjamin, Principles of Contract, Ch. IV.

"Necessaries" include goods, uses, and services for the supply of personal wants (such as food, clothing, lodging, medical attendance, instruction, and the like) (*a*), suitable to the condition in life of such minor or other person (*b*) and to his actual requirements at the time of the supply (*c*).

They also include necessaries for his wife and children (*d*); but not supplies necessary for his

estate or to carry on business (*a*); nor personal supplies where he has a parent or guardian able and willing to reasonably provide for him (*e*).

(*a*) Tupper v. Cadwell, 12 Met. 559, 562.
Mason v. Wright, 13 Met. 306.
Pyne v. Wood, 145 Mass. 558.
Freeman v. Bridger, 4 Jones, L. (N. Car.) 1.
McCarty v. Carter, 49 Ill. 53.
Decell v. Lewenthal, 57 Miss. 331.
House v. Alexander, 105 Ind. 109.
Allen v. Lardner, 78 Hun, 603.

(*b*) Peters v. Fleming, 6 M. & W. 42, 46.
Ryder v. Wombwell, L.R. 4 Ex. 32, 38.
Davis v. Caldwell, 12 Cush. p. 513.
McKanna v. Merry, 61 Ill. 177, 179.
Sams v. Stockton, 14 B. Mon. 232.
Jordan v. Coffield, 70 N. Car. 110.

(*c*) Barnes v. Toye, 13 Q.B.D. 410.
Johnstone v. Marks, 19 Q.B.D. 509.
Johnson v. Lines, 6 W. & S. 80.
Trainer v. Trumbull, 141 Mass. p. 530.

(*d*) Chapple v. Cooper, 13 M. &. W. p. 259.
Read v. Legard, 6 Exch. 636.
People v. Moores, 4 Denio, p. 519.
Tupper v. Cadwell, 12 Met. p. 562.
Cantine v. Phillips, 5 Harrington (Del.) 428.
Price v. Sanders, 60 Ind. 315.

(*e*) Wailing v. Toll, 9 Johns. 141.
Kline v. L'Amoureux, 2 Paige, 419.
Guthrie v. Murphy, 4 Watts, 80.
Perrin v. Wilson, 10 Mo. 451.
Davis v. Caldwell, 12 Cush. 512.
Hoyt v. Casey, 114 Mass. 399.
McKanna v. Merry, 61 Ill. 177.
Conboy v. Howe, 59 Conn. 112.

3. Beeler v. Young, 1 Bibb, 519.
Gay v. Ballou, 4 Wend. 403.
Earle v. Reed, 10 Met. 387.

Trainer v. Trumbull, 141 Mass. 530.
Bradley v. Pratt, 23 Vt. 378.
Guthrie v. Morris, 22 Ark. 411.
Johnston v. Maples, 49 Ill. 104.
Werner's Appeal, 91 Pa. St. 222.
Barnes v. Barnes, 50 Conn. 572.
Gregory v. Lee, 64 Conn. 413.

4. In re Rhodes, 44 Ch. D. 94, 105–107.
LaRue v. Gilkyson, 4 Pa. St. 375.
Ingraham v. Baldwin, 9 N.Y. p. 48.
Sawyer v. Lufkin, 56 Me. 308.
Sceva v. True, 53 N.H. 630.
Blaisdell v. Holmes, 48 Vt. 492.
Fruitt v. Anderson, 12 Ill. App. 421.
Reando v. Misplay, 90 Mo. 251.

5. Gore v. Gibson, 13 M. & W. p. 625.

Rule 60.—(B.) THERE MAY BE A CONTRACT OF SALE BETWEEN ONE PART OWNER AND ANOTHER.

A tenant in common of goods may sell his interest therein to a co-tenant or to a third person.

Rule 61.—WHERE IN AN ACTION FOR TRESPASS (1) TO GOODS, OR FOR THE CONVERSION (2) OR WRONGFUL DETENTION (3) OF GOODS THE PLAINTIFF RECOVERS THE FULL VALUE OF THE GOODS AS DAMAGES, AND THE DEFENDANT SATISFIES THE JUDGMENT, THE TRANSACTION OPERATES AS A SALE OF THE GOODS FROM THE PLAINTIFF TO THE DEFENDANT AS FROM THE TIME WHEN THE WRONG WAS COMMITTED (4).

1. *Solutio pretii emptionis loco habetur.* "So where one doth take my goods as a trespasser and I re cover damages for them upon a suit at law, in this case the law doth give him the property of the goods, *because he hath paid for them.*"

Sheppard's Touchstone, 227.
Fox v. Prickett, 34 N.J.L. p. 17.
Murray v. Lovejoy, 2 Clifford, 191, 198.
Lovejoy v. Murray, 3 Wal. 1, 16.
Smith v. Smith, 50 N.H. 212.

2. Cooper v. Shepherd, 3 C.B. 266, 272.
Brinsmead v. Harrison, L.R. 6 C.P. 584, 588.
Osterhout v. Roberts, 8 Cow. 43, 44.
Marsden v. Cornell, 62 N.Y. p. 220.
Brady v. Whitney, 24 Mich. 154.
Atwater v. Tupper, 45 Conn. 144, 147.
Elliott v. Hayden, 104 Mass. p. 181.
Miller v. Hyde, 161 Mass. 472, 474.

3. Ex parte Drake, 5 Ch. D. 866, 871.
Eberle v. Jonas, 18 Q.B.D. p. 468.
Sharp v. Gray, 5 B. Mon. 4, 6.

4. "The change of title is by operation of law; and the law will not deprive one of his property without his consent until he receives compensation" (*a*). But thereupon the wrongdoer's title relates back to his wrongful act (*b*).

(*a*) Atwater v. Tupper, 45 Conn. p. 148.

(*b*) Hepburn v. Sewell, 5 Har. & J. 211.
Smith v. Smith, 51 N.H. 571.

Rule 62.—THE RULES OF THE COMMON LAW, INCLUDING THE LAW MERCHANT, SAVE IN SO FAR AS THEY HAVE BEEN CHANGED BY STATUTES, AND IN PARTICULAR THE RULES RELATING TO THE LAW OF PRINCIPAL AND AGENT (1) AND THE EFFECT OF MISTAKE, MISREPRESENTATION, FRAUD, DURESS, UNDUE INFLUENCE, OR OTHER INVALIDATING CAUSE (2), APPLY TO CONTRACTS FOR THE SALE OF GOODS.

1. See works on the law of Agency and Partnership.

2. See Benjamin, Principles of Contract, Chapters V. and VI.

Rule 63.—THE RULES OF THIS WORK RELATING TO CONTRACTS OF SALE DO NOT APPLY TO ANY TRANSACTION IN THE FORM OF A CONTRACT OF SALE WHICH IS INTENDED TO OPERATE BY WAY OF MORTGAGE, PLEDGE, CHARGE, OR OTHER SECURITY.

Such transactions are not to be dealt with as *contracts of sale.*

APPENDIX.

SALE OF GOODS ACT, 1893.

[56 & 57 Victoria, Ch. 71.]

The history of this Act is given by its draftsman, Judge Chalmers, as follows:

"The Bill was orignally drafted by me in 1888. I then settled it in consultation with Lord Herschell, who kindly consented to take charge of it. In 1889, Lord Herschell introduced it in the House of Lords, not to press it on, but to get criticisms on it. In 1890 there was no opportunity of proceeding with it, but in 1891 the bill was again introduced in the Lords, and referred to a Select Committee. It had in the meantime been criticised by Lord Bramwell, Mr. Walter Ker, and other friends, and the Bar Committee had submitted a valuable memorandum on it. In the Lords it was carefully considered by a Select Committee, consisting of Lords Herschell, Halsbury, Bramwell, and Watson. A question arose as to its extension to Scotland, so the Bill stood over till 1892. It was then again introduced in the Lords, and extended to Scotland, on the advice of Lord Watson, who had consulted various Scotch legal authorities. Professor Richard Brown and Mr. Spens of Glasgow took an infinity of pains to suggest the necessary amendments. In 1893 the Bill was again passed through the Lords in the form in which it was settled in 1892. It was then considered by a Select Committee of the House of Commons and further amended. The Committee consisted of Sir Charles Russell, A.G., Sir R. Webster, Q.C., Mr. Asher, Q.C. (the Scotch Solicitor-General), Mr. Shiress Will, Q.C., Mr. Bousfield, Q.C., Mr. Ambrose, Q.C., and Mr. Mather. Some of the amendments introduced by the Commons were modified on its return to the Lords, and it was finally settled in its present form.

"The Bill, in its original form was drafted on the same lines as the Bills of Exchange Bill. On Lord Herschell's advice, it endeavoured to reproduce as exactly as possible the

existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the Legislature. So far as England is concerned, the conscious changes effected in the law have been very slight."

An Act for codifying the Law relating to the Sale of Goods. [20th February 1894.]

PART I.

Formation of the Contract.

Contract of Sale.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject matter of Contract.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. When there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

8.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

11.—(1) In England or Ireland—

(*a*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(*b*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to

a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract:

(*c*) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement

to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows.—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality:

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the

seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(*a*) When ne signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of

disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1) Where there is contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title.

21.—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(*a*) The provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b*) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the

time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or

other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or the transfer of any document of title to the goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question

in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33.—Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38.—(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(*c*) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(*a*) Where the goods have been sold without any stipulation as to credit;

(*b*) Where the goods have been sold on credit, but the term of credit has expired;

(*c*) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

(*a*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu,* that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at

an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu.*

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and

on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

Actions for Breach of the Contract.

Remedies of the Seller.

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary

course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the

plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special

damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid

from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in

particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1) In this Act, unless the context or subject matter otherwise requires,—

"Action" includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

"Bailee" in Scotland includes custodier:

"Buyer" means a person who buys or agrees to buy goods:

"Contract of sale" includes an agreement to sell as well as a sale:

"Defendant" includes in Scotland defender, respondent, and claimant in a multiplepoinding:

"Delivery" means voluntary transfer of possession from one person to another:

"Document of title to goods" has the same meaning as it has in the Factors Acts:

"Factors Acts" mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

"Fault" means wrongful act or default:

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale:

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

"Lien" in Scotland includes right of retention:

"Plaintiff" includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counterclaiming:

"Property" means the general property in goods, and not merely a special property:

"Quality of goods" includes their state or condition:

"Sale" includes a bargain and sale as well as a sale and delivery:

"Seller" means a person who sells or agrees to sell goods:

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made:

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This Act may be cited as the Sale of Goods Act, 1893.

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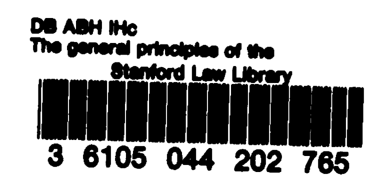
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